TRANSCRIPT OF RECORD.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. [redacted] 144

W. M. LENT, ET ALS., PLAINTIFFS IN ERROR,

vs.

CHARLES TILLSON,

TAX COLLECTOR OF THE CITY AND COUNTY OF SAN FRANCISCO,

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED

Under this decree of sale, the interest of the Wabash company in the elevator was sold to satisfy the bonds secured by the "general mortgage," and, as appears from the testimony, bid in by the purchasing committee of the holders of the "general mortgage" bonds, who, on this appeal, are endeavoring to maintain the claim that while the interest of the Wabash Company in the elevator was conveyed by the general mortgage, it failed to pass by the prior mortgage to the complainant (Rec., p. 71).

In this attempt they apparently overlook the principle that purchasers at a foreclosure sale, make themselves parties to the proceedings.

Kneeland vs. American Loan and Trust Company, 136 U. S.,89.

As against the appellants, therefore, this decree of sale is a conclusive adjudication upon the following points:

1. That the interest in the elevator was acquired and used by the Wabash company for railroad purposes.

2. That being so acquired and used, it passed both by the "general mortgage" and the prior mortgage to the complainant.

3. That the fact that the interest of the Wabash company was that of a stockholder in the Elevator company as well as that of an owner of the right to forever use the elevator, did not prevent the lien of both the "general mortgage" and the mortgage to the complainant from attaching thereto.

FIFTH POINT.

The decree of the Circuit Court should be affirmed.

EDWARD W. SHELDON,
THEODORE SHELDON,
Of Counsel for Appellee.

[646]

140-316
141-316

Submitted April 23 1888

TRANSCRIPT OF RECORD.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. ~~1114~~ ~~730~~ ~~443~~ 144

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CHARLES TILLSON,

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1

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

TRANSCRIPT ON APPEAL.

2

W. M. LENT, H. EPSTEIN, D. C. McGLYNN, JOSEPH MUSTO, DASHAWAY ASSOCIATION, C. DALL, J. C. COLLINS, J. McCABE, J. N. STAUD, EDWARD NEWMAN, UNITARIAN CHURCH, PETER ABRAHAMSON, D. V. KOOPMANSCHAP, C. F. FARGO, FRED HELLWIG, G. L. BRADLEY, SAMUEL SCHWEITZER, EDWARD BARRON, WM. CASAR, F. SCHERR, F. STAUD, F. PHILLIPS, DENNIS MAGNER, L. CARRIVEAU,

Plaintiffs,

3 *vs.*

WILLIAM MITCHELL, TAX COLLECTOR OF THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

COMPLAINT.

The above named plaintiffs by this their complaint, complain of the above named defendant, and for cause of action allege:

4 I.

That the said defendant is the Tax Collector of the said City and County of San Francisco.

II.

That the plaintiffs are severally the owners of the parcels of land set out in the Exhibit hereto annexed, marked "A," and made a part hereof, and each of said plaintiffs is the owner of the lot in said Exhibit under his name respectively described.

5 III.

That all of said parcels of land are situate in the said City and County of San Francisco, and are portions of the following described lands and premises, viz:

First. Beginning on the southerly line of Bush street, at a point equidistant between Dupont street, as it was known on March 23d, 1876, and Kearny street; thence southerly, parallel with said Dupont street, to the northerly line of Market street; thence westerly, on the northerly line of Market street to the easterly line of said Dupont street; thence upon the easterly line of
6 said Dupont street to the southerly line of Bush street; thence easterly on the southerly line of Bush street to the point of beginning.

Second. Beginning on the southerly line of Bush street, at a point equidistant between Dupont street, as it now is, and Stockton street; thence southerly, parallel with said Dupont street to the northerly line of Market street; thence easterly along said northerly line of Market street to the westerly line of said Dupont street; thence northerly, along said last named line to the southerly line of Bush street; thence westerly along said last named line to the point of beginning.

That said lands, above particularly described, are the

same lands mentioned and referred to in the proviso of Section 3 of the Act of the Legislature of the State of California, entitled "An Act to authorize the widening of Dupont street, in the City and County of San Francisco," approved March 23, 1876; which said Act the plaintiffs make a part of this complaint as fully as if the same were incorporated herein.

IV.

That the Board of Supervisors of the City and County of San Francisco did not, by resolution or order, within sixty days after the passage of said Act, or at any other time, express its judgment, or any judgment, that it would be expedient that Dupont street be widened in accordance with, or in the mode prescribed by said Act, or at all; and said Board of Supervisors failed within said period of sixty days after the passage of said Act, to pass any resolution, or adopt any order, declaring it expedient to widen Dupont street under the provisions of said Act; and by reason thereof, the said Board of Dupont street Commissioners, mentioned in said Act, never were constituted a legal Board, and never were authorized to act under the provisions of said Act.

That none of the property-owners fronting on Dupont street, between Bush and Filbert streets, ever did petition for the widening of said Dupont street between said streets, nor was any petition by them, or any of them, ever filed with the Board of Commissioners aforesaid.

V.

That under said Act, the said Board of Dupont street Commissioners, though wholly without authority, proceeded to act as such Board under the provisions of said Act. But said Board did not at any time publish in two of the daily papers of said City and County of San Francisco, for a period of ten days, the notice to property

10 owners required by Section 6 of said Act, or any notice in that behalf.

VI.

That said Board, nevertheless, proceeded under the provisions of said Act to prepare and adopt maps, plans and diagrams, as provided in Section 7 of said Act, and proceeded in form to ascertain, determine and separately state and set down in a written report, signed by them, the description and pretended cash value of the several lots and subdivisions of land and buildings included in
11 the land taken for the widening of said Dupont street, between the northerly line of Market street and the southerly line of Bush street, and the pretended damages done to the property along the line of said street, in form but not in fact, as provided and required in said Act; and also proceeded, in form but not in fact, to ascertain and set down in said report a description of the several subdivisions or lots of land included in the districts designated in the proviso contained in Section 3 of said Act, with the sum or amount which the said Board pretended to have estimated each lot has been or will be benefited by reason of the widening of said street, and
12 completed their report in form as required by said Act; and the same was completed on the 23d day of September, 1876, and was filed by said Board in the County Court of said City and County of San Francisco, on the 27th of October, 1876.

VII.

That each of said lots taken for the widening of said Dupont street, was a portion of a larger lot owned by the same person who owned the part taken, and the taking of each of said lots for said widening was in effect the same as taking thirty feet in depth from the rear of each of said larger lots, for the reason that after the lot was

taken, the remainder still fronted upon the said Dupont street as widened; that is to say that the value of the thirty feet of each lot taken is and was the difference between the value of the whole lot before the taking and the value of the same lot diminished in depth thirty feet. Nevertheless the said Commissioners in fixing the value of the land to be taken treated it as of the same value as a front lot of only thirty feet in depth, and estimated its value at above 200 per cent. greater than it in fact was, and knowingly, wilfully and intentionally ascertained and determined the value of the lots taken to be more than three times as much as they in fact were; by reason whereof the cost of the said widening was made three times as great as it ought to have been.

VIII.

That the said Board of Commissioners in ascertaining and setting down in said report the sum or amount in which each lot included in the lands hereinbefore described has been or will be benefited by reason of the widening of said street, wilfully, knowingly and intentionally adopted a false rule for the ascertainment thereof, and one which was and is neither equal or uniform. They did not, in estimating benefits, consider the lots which by the widening would become front lots, by reason of being given a frontage on the street as widened, as rear lots before the widening, but did consider them as front lots, and as deriving only the same benefit as the lots on the opposite side of the street which already had a frontage, and wilfully and intentionally omitted from their estimate of benefit on said lots on the west side thereof, about two-thirds of the actual benefits derived by them respectively.

IX.

That in fixing the ratio of benefits on all and every

16 portion of the property assessed for benefits in said report, the said Board wilfully and knowingly adopted a false rule for the ascertainment thereof in this: that they computed the same upon the increased value of the property after the widening, instead of upon the increase in value thereof; that the effect of the adoption of this rule was and is to make the various assessments for benefits grossly unequal and wholly wanting in uniformity, and this was well known to the said Commissioners, and the same was intentionally done by them.

X.

17 That said Board of Commissioners after they had estimated in full all the cost and expenses which could probably or at all arise in the said widening of said Dupont street, arbitrarily and illegally added thereto the further sum of seventy thousand nine hundred and thirty-five dollars, and knowingly and wilfully included in their estimate of the expense of said widening, said sum of seventy thousand nine hundred and thirty-five dollars, no part of which was, in any manner authorized by said Act, or in any manner necessary for the work provided for in said Act, nevertheless the same is in-
18 cluded in the report of said Board, as confirmed, and is included in the assessment for widening said street, and in the levy therefor, hereinafter mentioned. And said Board of Commissioners have so negligently and carelessly managed their affairs that they have permitted the whole, or greater portion of said sum of seventy thousand nine hundred and thirty-five dollars to be drawn out, misappropriated and converted, and utterly lost, by some person or persons to these plaintiffs unknown.

XI.

That notice that the said report was open for the free inspection of all parties interested, for any period of

19 thirty days, was not published by said Board daily for twenty days in any two daily newspapers published in said City and County of San Francisco, and the notice required by Section 7 of said Act, was never published in any two papers daily for twenty days, as therein provided and required, or at all.

XII.

That at divers dates between the 5th day of October, 1876, and the 25th day of October, 1876, William Sharp, Theodor Meetz, B. Simon, T. H. Blythe, George W. Os-
20 born, James Phelan, David Hunter, P. Marsicano, L. Carivaux and Josephine Robinett, each filed objections in the said County Court to the said report, and proposed and threatened to contest the same before the said Court and were about to contest the same for the matters hereinbefore set forth and other matters; and thereupon the said Commissioners, to induce them to withdraw their said objections, and to prevent the said matters from becoming publicly known, secretly and collusively and fraudulently entered into an arrangement with said objectors respectively, by which said objectors agreed to withdraw their said objections, and the said Board of
21 Commissioners, by their attorney, agreed, in consideration thereof, to change, or procure to be changed, their said report as to the property of said objectors, so as to reduce, or cause to be reduced, the amount of estimated benefits on the property of said T. H. Blythe from $97,308, as originally stated in said report, to $39,653; and to reduce, or cause to be reduced, the amount of estimated benefits on the property of said Meetz and Simon from $20,758, as stated in said report, to $15,758; and to reduce, or cause to be reduced, the amount of estimated benefits on the property of said William Sharp from $2,288, as stated in said report, to $2,038; and to reduce, or cause to be reduced, the amount of estimated

benefits on the property of said George W. Osborn from $17,444, as stated in said report, to $12,444; and to reduce, or cause to be reduced, the amount of estimated benefits on the property of said James Phelan from $98,427, as stated in said report, to $78,427; and to reduce, or cause to be reduced, the estimated benefits on the property of said David Hunter from $25,205, as stated in said report, to $17,205; and to reduce, or cause to be reduced, the estimated benefits on the property of P. Marsicano from $15,844, as stated in said report, to $11,844; and to reduce, or cause to be reduced, the estimated benefits upon the property of L. Carivaux from $4,653, as stated in said report, to $3,400; and to increase, or cause to be increased, the estimated value of the property of James Phelan taken for said widening, from $15,000, as stated in said report, to $25,000; and to increase, or cause to be increased, the estimated value of the property of Josephine Robinett taken for said widening, from $16,000, as stated in said report, to $20,000; and to increase, or cause to be increased, the valuation of the property of David Hunter taken for said widening, from $2,438, as stated in said report, to $5,174; and thereupon, in pursuance of said arrangement, upon the consent of the said objectors respectively and of the said Commissioners, the said County Court entered an order as to each objector, directing the said Board of Commissioners to modify the said report as above stated, and in accordance with said arrangement; and the said report was by said Commissioners modified accordingly, and as so modified was confirmed by said Court by an order entered in its minutes, on the 20th of December, 1876.

That said changes were ordered by said Court, upon the consent of the said objectors and Commissioners alone, without any investigation of the subject matter of the objections, and without any actual consideration of the merits, and without any proofs of any kind.

25 That said changes and alterations were made by the said Board of Commissioners, and consented to as aforesaid, for the sole purpose of inducing the said persons to withdraw their objections, and to prevent an examination on the merits, and to prevent publicity as to the said frauds contained in the said report, and without the consent, knowledge or approval of the other persons affected by said assessment; and the said orders were in fact obtained by fraud and collusion and imposition upon the said Court.

That in making said changes and alterations, deductions and additions, a different mode of estimating the
26 extent of benefits and the value of property taken was applied to the property of said persons above named, from that which was in said report applied to the property of the other persons affected by said assessment, to the great detriment and disadvantage of said other persons, including these plaintiffs, and thereby and by said changes and alterations the burden of assessment upon the said other persons whose property was assessed, was increased upwards of $125,000, and all equality and uniformity of assessment upon the various lots and subdivisions assessed, was destroyed, and this was knowingly and
27 intentionally done by said Commission.

XIII.

That after the said Thomas H. Blythe had filed his objections in the said County Court, as hereinbefore stated, and while he was claiming or about to claim in said Court that said Board in estimating the value of property taken, had adopted the wrong rule in estimating the value thereof, as stated in paragraphs VII and VIII hereof, the said Board of Commissioners, in order to induce the said Blythe to withdraw his objections, entered into an arbitration with the said Blythe, and by agreement between the said Blythe and the said Board of Commissioners,

28 D. C. McRuer, Thos. D. Mathewson and Eugene McCarthy were appointed arbitrators, and it was submitted to them, as such arbitrators, to determine what amount of the fair and legitimate cost of the widening of Dupont street should be assessed upon the property of said Blythe, and it was agreed by the said Board in the matter of said arbitration, that the said arbitrators in making their determination, should consider the whole subject of allowance for damages to land and the apportionment of benefits the same as though nothing had been done in the premises by any one theretofore, and that the said arbitrators should take as a basis for allowing damages
29 the difference in value between the lots on the west side of said Dupont street as they were before the widening, and the value of the same lots diminished in depth thirty feet. The said arbitrators thereupon proceeded to make their estimates accordingly, and they found and ascertained and reported to said Board of Commissioners that the value of the whole land taken for said widening under the rule last stated was only $246,240, instead of $639,913, as found by the said Board of Commissioners under the rule adopted by them; and they, said arbitrators, further found, ascertained and reported to said Board
30 of Commissioners that said Blythe's property would be benefited and should pay only the sum of $39,653, instead of $97,308, as found by said Board of Commissioners, and thereupon the said Board of Commissioners, for the purpose of inducing said Blythe to withdraw his exceptions as stated in the preceding paragraph hereof, consented to change and diminish the amount of estimated benefits on the property of said Blythe from $97,308 to $39,653, and the same was done as stated in the last preceding paragraph hereof. That none of the other parties affected by said assessment had any notice of the matters in this paragraph alleged, or any opportunity whatever to contest the same or to be heard thereon; but the same

and the whole thereof was concealed by the said Board of Commissioners from the plaintiffs and all the other persons whose property was and is affected by the said pretended assessment.

XIV.

That said Board of Commissioners never did in fact, nor did any member thereof, ascertain or determine the value of the several lots and subdivisions of land, or any of them, or buildings, or any of them, included in the land taken for the widening of said Dupont street, or the damage done to the property along the line of said street, or any of it, or the amount which the said lots assessed, or any of them, would be benefited by reason of the widening of said street; on the contrary, said Board of Commissioners, instead of themselves personally examining into said matters, employed certain persons whom they called or designated experts, to ascertain and determine, all and singular, said matters for them; and said Board of Commissioners, in fact, adopted the estimates of said experts as to all said matters, and embodied them in their said report without ever in fact having made any estimate of their own.

XV.

That at all the dates and times in this complaint mentioned, A. J. Bryant, Mayor of the City and County of San Francisco, and one of the persons named in said Act as a Commissioner, and one of said Board of Dupont Street Commissioners, was a property owner on said street, and was the owner of real property situate on the east side of said street, which by said Act was liable to be, and was in fact, assessed for said widening of said Dupont street.

That the experts appointed by said Board of Commissioners, as hereinbefore alleged, were Richard Ivers, C. H. Reynolds and George Worn. That said Richard Ivers

34 while acting as such expert, was interested in the lot on the northwest corner of said Dupont and O'Farrell streets, being thirty-six and one-half feet on Dupont street, by a uniform depth of eighty feet. That he purchased the same from John Griffin, after the experts had made their estimates, and before they had reported them to the said Board of Commissioners, and took the title in the name of Robert Watt and Francis Berton.

That the said Robert Watt and Francis Berton advanced the greater portion of the money to pay for the same on behalf of said Ivers, and took the joint notes of said Ivers and Bryant to themselves to evidence the repay-
35 ment to said Watt and Berton of $60,000 of the purchase money of said lot.

That the said C. H. Reynolds was the broker who made the sale of the said property for said John Griffin, and received for his compensation in making said sale the sum of $2,500.

That the said experts reported, and said Board of Commissioners awarded for the taking of the thirty (30) feet of said lot taken for said Dupont street the sum of $38,-354, and for the improvements thereon the sum of $4,286, and the portion of the lot which remained after cutting off
36 the 30 feet for widening was worth not less than $60,000; and these said plaintiffs aver that the said A. J. Bryant was not a disinterested Commissioner in the matter of said improvement, but was, in fact, acting in all said matters, as a judge in his own cause.

XVI.

That notwithstanding the said Board of Dupont Street Commissioners, never, in fact, acquired jurisdiction to widen any portion of said Dupont street, and notwithstanding that said notices were none of them given as hereinbefore alleged, the said Board of Dupont Street Commissioners did proceed as aforesaid to organize, esti-

37 mate and report as aforesaid, and upon the confirmation of said report, although the total cost of the improvement was fixed by the report as confirmed at only $914,941, yet the said Commissioners proceeded to issue and did issue bonds based upon said pretended assessment to the amount of just $1,000,000—more than seventy thousand dollars, over and above what according to their own estimates they were entitled to issue; and the Board of Supervisors of said City and County of San Francisco, professing to act under Section 13, of said Act, did for the last fiscal year levy a tax, based upon said estimated benefits, sufficient to pay seven per cent. interest upon said million dollars of
38 bonds, together with one-twentieth of the principal thereof, and have also levied a tax thereon for the present fiscal year sufficient to pay seven per cent. interest upon said bonds, and one-twentieth of the principal thereof.

XVII.

That by the said report, as it was finally confirmed by said Court, the total amount in which all said property described in Subdivision III hereof, and in said proviso to Section 3 of said Act was found, ascertained, and reported by said Board of Commissioners to be benefited, was and
39 is the sum of seven hundred and ninety-six thousand eight hundred and thirty-seven (796,837) dollars, and no more; and the total cost and expense of the said improvement of widening said street, including the value of the lands and buildings taken and the damage done to the property along the line of the street was found, ascertained and reported to be the sum of nine hundred and fourteen thousand nine hundred and forty-one (914,941) dollars.

XVIII.

That the said order and decree of the said County Court, approving and confirming said report, recites

46 themselves, and for all others affected by the said illegal tax.

Wherefore, plaintiffs pray that the defendant aforesaid may be enjoined from proceeding to sell any real estate under said Dupont street tax or assessment; that said sale which he threatens to make be enjoined; that the said pretended tax be adjudged and declared illegal, unauthorized and void, and that in the mean time said sale may be enjoined and prohibited until the further action of this Honorable Court.

BISHOP & FIFIELD,
GARBER & THORNTON,
T. H. HITTELL,
47 SHARP & SHARP,
Attorneys for Plaintiffs.

EXHIBIT A.

W. M. Lent, lot north line Post street 73 feet 6 inches east from Dupont street; thence east 38 feet by 23 feet in depth.

Lot northeast corner Post and Dupont streets; thence north 23 feet by 73 feet 6 inches in depth.

Lot east line Dupont street, 23 feet north from Post
48 street; thence north, 18 feet 6 inches; thence east 50 feet; thence north 17 feet 6 inches; thence east 58 feet; thence south 36 feet; thence west 108 feet to beginning.

Lot east line Dupont street, 41 feet 6 inches north from Post street; thence north 17 feet 6 inches, by 50 feet in depth.

Lot east line Dupont street, 59 feet north from Post street; thence north 14 feet; thence east 111 feet 6 inches; thence south 50 feet; thence west 3 feet 6 inches; thence north 36 feet; thence west 108 feet to beginning.

49 C. F. Fargo, lot southwest corner Dupont street and Harlan place; thence south 44 feet by 55 feet in depth. Lot southeast corner Dupont and Bush streets; thence east 69 feet by 100 feet in depth.

Peter Abrahamson, lot south line Bush street, 69 feet east from Dupont street; thence east 34 feet 6 inches by 60 feet in depth.

D. V. Koopmanschap, lot north line Geary street, 40 feet 6 inches east from Dupont street; thence east 40 feet 1¼ inches by 60 feet in depth.

Henry Epstein, lot northeast corner Geary and Dupont streets; thence north 102 feet 6 inches; thence east 60
50 feet; thence south 42 feet 6 inches; thence west 19 feet 6 inches; thence south 60 feet; thence west 40 feet 6 inches.

Fred'k Hellwig, lot southeast corner Dupont and Morton streets; thence south 20 feet by 60 feet in depth.

D. C. McGlynn, lot north line Morton street, 113 feet east from Dupont street; thence east 42 feet by 60 feet in depth.

G. L. Bradley, lot northeast corner Morton and Dupont streets; thence north 20 feet by 60 feet in depth.

Jos. Musto, lot east line Dupont street, 60 feet south
51 from Post street; thence south 42 feet 6 inches by 60 feet in depth.

Sam'l Schweitzer, lot southeast corner Post and Dupont streets; thence south 60 feet by 60 feet in depth.

Trustees Dashaway Association, lot south line Post street, 60 feet east from Dupont street; thence east 53 feet by 122 feet 6 inches in depth.

Edward Barron, lot south line Post street, 175 feet east from Dupont street; thence east 31 feet 3 inches by 122 feet 6 inches in depth.

C. Dall, lot north line Sutter street, 30 feet west from Dupont street; thence west 25 feet by 82 feet in depth.

Wm. Casar, lot north line Sutter street, 149 feet west

52 from Dupont street; thence west 23 feet by 65 feet in depth.

Lot south line Post street, 63 feet 1 inch west from Dupont street; thence west 44 feet by 80 feet in depth.

J. C. Collins, lot south line Bush street, 66 feet west from Dupont street; thence west 41 feet 6 inches by 63 feet in depth.

H. F. Scherr, lot north line Post street, 68 feet 10½ inches west from Dupont street; thence west 25 feet by 72 feet 6 inches in depth.

Lot north line Post street, 93 feet, 10½ inches west from Dupont street; thence west 25 feet, thence north 72
53 feet 6 inches, thence west 1 foot 3 inches; thence north 50 feet, thence east 51 feet 3 inches, thence south 50 feet, thence west 25 feet; thence south 72 feet 6 inches to point of beginning.

J. McCabe, lot south line Sutter street, 58 feet west from Dupont street; thence west 22 feet by 75 feet in depth.

F. and J. N. Staud, lot south line Stockton place, 44 feet 10½ inches west from Dupont street; thence west 25 feet by 50 feet in depth.

F. Phillips, north line Geary street, 62 feet 6 inches west from Dupont street; thence west 22 feet 6 inches by 60
54 feet in depth.

Edward Newman, lot north line Geary street, 85 feet west from Dupont street; thence west 45 feet 5 inches by 60 feet in depth.

Dennis Magner, lot north line Geary street, 153 feet 4 inches west from Dupont street; thence west 22 feet 11 inches by 60 feet in depth.

Unitarian Church, lot south line Geary street, 132 feet 6 inches west from Dupont street; thence west 58 feet 9 inches by 137 feet 6 inches in depth.

L. Carriveau, lot south line Geary street, 107 feet 6 inches west from Dupont street; thence west 3 feet, thence south 100 feet, thence west 22 feet, thence south 37 feet

55 6 inches, thence east 25 feet, thence north 137 feet 6 inches to point of beginning.

Lot south line Geary street, 80 feet west from Dupont street; thence west 27 feet 6 inches by 137 feet 6 inches in depth.

State of California, }
City and County of San Francisco, } ss.

Wm. Casar, Louis Carriveau, F. Phillips, F. Staud, and Fred Hellwig, being severally duly sworn, each for himself, and not one for the other, upon his oath doth say,
56 that he is one of the plaintiffs in the foregoing Complaint mentioned; that the said Complaint is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters, that he believes it to be true.

William Casar,
Louis Carriveau,
F. Phillips,
F. Staud,
Fr. Hellwig.

57

Subscribed and sworn to before me, this 4th day of April, A. D. 1879.

T. W. Taliaferro,
(seal.) *Notary Public.*

(Endorsed): Filed April 5th, 1879.
Tho's H. Reynolds, *Clerk.*
By J. D. Ruggles, *Dep. Clerk.*

58

In the Superior Court, City and County of San Francisco, State of California.

MARCH 23d, 1880.

W. M. LENT, ET AL.
Plaintiffs,

vs.

W. MITCHELL, TAX COLLECTOR, &c.
59 *Defendant.*

Order Assigning Cause.

It is ordered that the above entitled cause (pending in the District Court of the 12th Judicial District of the State of California, in and for the City and County of San Francisco, on the 31st day of December, A. D. 1879,) be, and the same is hereby assigned to Daingerfield, Judge, Department No. One of this Court.

WM. P. DAINGERFIELD,
60 *Presiding Judge.*

(Endorsed:) Filed March 23d, 1880.

WILLIAM A. STUART, *Clerk.*
By CHAS. E. NOUGUES, *Deputy Clerk.*

61

In the Superior Court, City and County of San Francisco, State of California.

TUESDAY, March 23d, 1880.

Present: Hon. WM. P. DAINGERFIELD, Judge.

WM. M. LENT ET AL.
Plaintiffs,

vs.

62

WM. MITCHELL, TAX COLLECTOR, &c.,
Defendant.

Order Substituting Charles Tillson as Defendant.

In this action, on motion of T. I. Bergin, Esquire, appearing of counsel, and suggestion of death of Wm. Mitchell, Tax Collector, &c., defendant herein, it is ordered that Chas. Tillson, Tax Collector of the City and
63 County of San Francisco, be, and he is hereby substituted as a party defendant herein, in the place and stead of said Wm. Mitchell, deceased.

(Endorsed:) Filed March 25th, 1880.

WILLIAM A. STUART,
Clerk.

By P. DEVENY,
Deputy Clerk.

64

In the Superior Court, City and County of San Francisco, State of California.

JULY 7th, 1880.

WM. LENT ET AL., *Plaintiffs.*

vs.

WM. MITCHELL, TAX COLLECTOR,

65 *Defendant.*

Order Assigning Cause.

It is ordered that the above entitled cause (pending in the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco, on the 31st day of December, A. D. 1879) be, and the same is hereby assigned to Hon. M. A. Edmonds, Judge, Department No. 6 of this Court.

T. K. WILSON,

66 *Presiding Judge.*

[Endorsed:] Filed July 7th, 1880.

WILLIAM A. STUART,
Clerk.

BY J. D. RUGGLES,
Deputy Clerk.

67

In the Superior Court, City and County of San Francisco, State of California.

FEBRUARY 28th, A. D. 1881.

W. M. LENT ET AL., *Plaintiffs.* vs. CHARLES TILLSON, TAX COLLECTOR, &C. *Defendant.*	*12th District Court* *No. 22,809.*

68

Order Transferring Cause for further Hearing.

Ordered that the above entitled cause be transferred to Oliver P. Evans, M. A. Edmonds and Robert Y. Hayne, Judges, for the hearing of all further proceedings.

OLIVER P. EVANS,
Presiding Judge.

Dated this 28th day of February, 1881.

[Endorsed:] Filed February 28th, 1881.

69

WILLIAM A. STUART,
Clerk.

By JOHN M. DAYS,
Deputy Clerk.

70

[Title of Court and Cause.]

Order Allowing Complaint in Intervention to be Filed.

Upon presentation of the sworn Complaint in Intervention in this action of D. O. Mills, and of the University of California, and of Jacob Rosenberg, Charles Lux and Joseph Rosenberg, Executors of the last Will of Michael Reese, deceased, and of William A. Piper, and of Charles F. MacDermot, and upon application of McAllister & Bergin, attorneys for said Intervenors; it is ordered that said D. O. Mills, University of California, Jacob Rosenberg, Charles Lux and Joseph Rosenberg, Executors of the last Will of Michael Reese, deceased, William A. Piper and Charles F. MacDermot be, and they hereby are allowed to intervene in this action and become parties thereto, and to file herein the aforesaid complaint in Intervention, and to unite with the defendant in resisting the claims of the plaintiffs herein.

71

And it is further ordered that a copy of said Complaint in Intervention be forthwith served upon plaintiffs' attorneys.

72 Dated San Francisco, August 13th, 1880.

M. A. EDMONDS,
Judge.

[Endorsed.] Filed August 13th, 1880.

WM. A. STUART,
Clerk.

By JOHN M. DAYS,
Deputy Clerk.

73 [Title of Court and Cause.]

Complaint in Intervention of D. O. Mills, and of the University of California, and of Jacob Rosenberg, Charles Lux and Joseph Rosenberg, Executors of the Last Will of Michael Reese, Deceased, and of William A. Piper, and of Charles F. MacDermot:

The Complaint in Intervention of D. O. Mills, and of The University of California, and of Jacob Rosenberg, Charles Lux and Joseph Rosenberg, Executors of the last
74 will of Michael Reese, deceased, and of William A. Piper, and of Charles F. MacDermot:

1st. These Intervenors aver, and each for himself, and not one for the other, avers that he is the owner and holder of certain Bonds, known and designated as the "Dupont Street Bonds," which were issued under, and, as these intervenors are informed and believe, in accordance with the provisions of that certain Statute of the State of California, entitled: "An Act to authorize the widening of Dupont Street, in the City of San Francisco," approved March 23d, 1876.

That said "Dupont Street Bonds" are one thousand in
75 number, that each of said bonds is for the sum of one thousand dollars, bears date the first day of January, 1877, is payable in gold coin of the United States, twenty years from the date thereof, and bears interest in like gold coin, at the rate of seven per cent. per annum, payable half-yearly, on the first day of July and the first day of January, of each year, upon interest coupons attached to each of said bonds.

The principal and interest of each of said bonds is payable at the office of the Treasurer of the City and County of San Francisco. Each of said bonds is executed under the official seal of the City and County of San Francisco, and is subscribed by the Mayor, the Auditor, and the City

76 and County Surveyor of said City and County of San Francisco, constituting the Board of Dupont Street Commissioners.

That each, and every of said Bonds is payable on the face to the holder, and is a negotiable bond, and is transferred by mere delivery from one holder thereof to another.

And these Intervenors aver, and each for himself, and not one for the other, avers that at the time he purchased and paid for that number of the said Dupont Street Bonds, which he now holds and owns
77 (which number and the particulars of his said purchase thereof are hereinafter specially alleged), he had no knowledge, or notice, either actual or constructive, either express or implied, and no suspicion, of any of the alleged omissions, or defects, or non-advertisements, or defective advertisements, or non-action, or defective action, by the Board of Supervisors of the City and County of San Francisco, or by the Board of Dupont Street Commissioners, or collusive agreements, or frauds, or willful or improper conduct on the part of the Board of Dupont Street Commissioners, or the adoption of any false rule of valuation, or of any false rule, by said Board of Dupont
78 Street Commissioners, all of which are charged in the Complaint herein.

And these Intervenors aver, and each for himself, and not one for the other, avers, that at the time he purchased and paid for that number of the said Dupont Street Bonds, which he now holds and owns (which number, and the particulars of his said purchase thereof, are hereinafter specially alleged), he had no knowledge, or notice, either actual or constructive, either express or implied, and no suspicion, of any defect, or vice, or infirmity, or fraud, in said Dupont Street Bonds, or in any of them, or in any of the acts, doings or proceedings which led to the issuance of said Bonds; on the contrary, he purchased and

79 paid for that number of said Bonds which he now holds and owns (as hereinafter specially alleged), and for every one of them, at the time and place hereinafter mentioned, in good faith, and before any question had arisen, or any action had been brought, concerning the validity of said Bonds, or of any of them, and relying upon the final judgment of the County Court of the City and County of San Francisco, rendered on the 20th December, 1876, in the matter of the widening of Dupont Street (which said judgment is hereinafter more particularly mentioned), and in the full belief that all the pre-requisites to the issuance of said Bonds, and to the issuance of every one of
80 them, had been fully complied with, and that said Bonds were good and valid and negotiable Bonds.

And these intervenors aver that they have an interest in the matter in litigation in this action, and in the success of the defendant herein ; that they and the other holders and owners of said Dupont Street Bonds are the real parties interested in the defense of this action ; that Charles Tillson is a mere nominal defendant, being only interested to perform his duty as Tax Collector, in collecting the tax levied, as alleged in the complaint, for the purpose of paying the interest on said bonds.

81 2d. These intervenors aver, the said D. O. Mills, upon his own personal knowledge, and the other Intervenors, according to their information and belief, that on the 6th day of February, 1878, at San Francisco, California, the said D. O. Mills purchased five of said Dupont Street Bonds, to-wit : Numbers 849, 850, 851, 852, 853, with all the interest coupons attached thereto ; and then and there paid therefor the sum of four thousand four hundred and fifty dollars ; that said D. O. Mills is now, and ever since said 6th day of February, 1878, has been the owner and holder of said five last mentioned Dupont Street Bonds, and of all the interest coupons attached thereto, save and except the first four of said coupons ; that the

82 interest due on said five last mentioned Bonds, on July 1st, 1879, and represented by Coupon No. 5, is wholly unpaid; also, that the interest due on said five last mentioned Bonds, on January 1st, 1880, and represented by Coupon No. 6, is wholly unpaid; also, that the interest due on said five last mentioned Bonds, on July 1st, 1880, and represented by Coupon No. 7, is wholly unpaid.

3d. These Interventors aver, the University of California and the said D. O. Mills, upon personal knowledge, and the other Intervenors, according to their information and belief, that on the 14th day of January, 1878, at
83 San Francisco, California, the University of California purchased forty of said Dupont Street Bonds, to-wit: Numbers 212, 213, 214, 215, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, with all the interest coupons attached thereto, and then and there paid therefor, the sum of thirty-six thousand dollars; that the University of California is now, and ever since said 14th day of January, 1878, has been the owner and holder of said forty last-mentioned Dupont Street Bonds, and of all the interest coupons attached thereto, save and except the
84 first four of said coupons, and that the interest due on said forty last-mentioned Bonds, on July 1st, 1879, and represented by Coupon No. 5, is wholly unpaid; also, that the interest due on said forty last-mentioned Bonds, on January 1st, 1880, and represented by Coupon No. 6, is wholly unpaid; also, that the interest due on said forty last-mentioned Bonds, on July 1st, 1880, and represented by Coupon No. 7, is wholly unpaid.

4th. These Intervenors aver, that said Joseph Rosenberg upon his own personal knowledge, and the other Intervenors according to their information and belief, that between the 5th day of November, 1877, and the 6th day of March, 1878, at San Francisco, California, Michael

85 Reese, now deceased, purchased thirty of said Dupont Street Bonds, to-wit: Numbers 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, with all the interest coupons attached thereto, and then and there paid therefor the sum of twenty-six thousand dollars; that from the 6th day of March, 1878, until his death on the 2d August, 1878, Michael Reese was the owner and holder of said thirty last-mentioned Bonds, and of all the interest coupons attached thereto, save and except the first three of said coupons, and that since the death of said Michael Reese, said thirty last-
86 mentioned Bonds have constituted, and do still constitute, part of the assets of his estate, and are now held, with all the interest coupons attached thereto, save and except the first four of said coupons, by the Intervenors Jacob Rosenberg, Charles Lux and Joseph Rosenberg, as executors of the last Will of said Michael Reese, deceased. That the interest due on said thirty last-mentioned Bonds, on July 1, 1879, and represented by Coupon No. 5, is wholly unpaid; also, that the interest due on said thirty last-mentioned Bonds on January 1, 1880, and represented by Coupon No. 6, is wholly unpaid; also that
87 the interest due on said thirty last-mentioned Bonds on July 1, 1880, and represented by Coupon No. 7, is wholly unpaid.

5th. These Intervenors aver, that said Michael Reese died on the 2nd day of August, 1878, and was at the time of his death, a resident of the City and County of San Francisco, State of California. That on the 5th day of September, 1878, Jacob Rosenberg, Charles Lux and Joseph Rosenberg were duly and legally appointed by the Probate Court of the City and County of San Francisco, executors of the last Will and Testament of said Michael Reese, and thereupon duly qualified as such, and are now acting as such executors.

88 6th. These Intervenors aver, the said Wm. A. Piper, upon his personal knowledge, and the other Intervenors, according to their information and belief, that on the 14th day of September, 1877, at San Francisco, California, the said Wm. A. Piper purchased fifty of said Dupont Street Bonds, to-wit: Numbers 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 317, 743, 744, 745, 746, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, with all the interest coupons attached thereto, and then and there paid therefor the sum of forty-seven thousand two hun-
89 dred and fifty dollars; that said Wm. A. Piper is now, and ever since said 14th day of September, 1877, has been, the owner and holder of said fifty last-mentioned Dupont Street Bonds, and of all the interest coupons attached thereto, save and except the first six of said coupons, and that the interest due on said fifty last-mentioned Bonds on July 1st, 1880, and represented by Coupon No. 7, is wholly unpaid.

7th. These Intervenors aver, the said Charles F. MacDermot, upon his personal knowledge, and the other Intervenors according to their information and belief, that,
90 in the month of March, 1877, at San Francisco, California, the said Charles F. MacDermot purchased twenty of said Dupont Street Bonds, to-wit, numbers 112, 341, 954, 955, 957, 959, 962, 966, 968, 971, 973, 975, 976, 977, 978, 980, 992, 993, 994, 995, with all the interest coupons attached thereto, and then and there paid therefor the sum of eighteen thousand nine hundred dollars; that said Charles F. MacDermot is now, and ever since the month of March, 1877, has been the owner and holder of said twenty last mentioned Dupont Street Bonds, and of all the interest coupons attached thereto, save and except the first four of said coupons, and that the interest due on said twenty bonds last mentioned on July 1st, 1879,

91 and represented by coupon No. 5, is wholly unpaid; also, that the interest due on said twenty last mentioned bonds on January 1st, 1880, and represented by coupon No. 6, is wholly unpaid; also, that the interest due on said twenty last mentioned bonds on July 1st, 1880, and represented by coupon No. 7, is wholly unpaid.

8th. These Intervenors defend against the claims of the plaintiffs in this action, and plead all the facts and matters hereinbefore alleged in answer to the complaint herein, and further answering said complaint, these Intervenors allege as follows:

92 In answer to *Subdivision IV* of said complaint, they deny, according to their information and belief, that the Board of Supervisors of the City and County of San Francisco did not, by resolution or order, within sixty days after the passage of said Act, or at any other time, express its judgment, or any judgment, that it would be expedient that Dupont street should be widened in accordance with, or in the mode prescribed by, said Act, or at all; and denies that said Board of Supervisors failed within said period of sixty days after the passage of said Act to pass any resolution or adopt any order declaring it expedient to widen Dupont street under the provisions of

93 said Act, and denies that by reason thereof, or by reason of any matter or thing in said complaint alleged, said Board of Dupont Street Commissioners, mentioned in the Act of the Legislature, in said complaint alleged, never were constituted a legal Board, or never were authorized to act under the provisions of said Act, but aver, on the contrary, according to their information and belief, that said Board of Supervisors, within sixty days next after the passage of said Act of the Legislature, did, by resolution and order, express its judgment that it would be expedient that Dupont street be widened in accordance with, and in the mode prescribed by, said Act of the Legislature; and avers that said Board of Dupont Street

94 Commissioners did become and was a legal Board, and were duly authorized to act under and by virtue of the provisions of said Act of the Legislature.

9th. And as to *Subdivision V* of said complaint, these Intervenors, according to their information and belief, deny that under said Act the said Board of Dupont Street Commissioners, though wholly without authority, proceeded to act as such Board, under the provisions of said Act, but avers, on the contrary, according to their information and belief, that said Board of Commissioners proceeded to act, and did act, under and in pursuance of
95 the provisions of said Act of the Legislature, and were lawfully authorized thereunto by the provisions of said Act of the Legislature, and they did act in conformity therewith, and not otherwise; and deny, according to their information and belief, that said Board of Dupont Street Commissioners did not, at any time, publish in the daily papers of said City and County of San Francisco, for a period of ten days, the notices to property owners required by Section 6 of said Act, or any notice in that behalf; and aver, on the contrary, according to their information and belief, that said Board of Dupont Street Commissioners did, at the time and in the manner pre-
96 scribed in and by the provisions of said Act of the Legislature, publish the notice to property owners required by the provisions of Section 6 of said Act of the Legislature, and in strict conformity therewith.

10th. And answering unto the *VI Subdivision* of said complaint, these Intervenors deny, according to their information and belief, that said Board of Dupont Street Commissioners, without publication of the notice to property owners required by the provisions of Section 6 of said Act, or without being thereunto duly authorized, under and by virtue of the provisions of said Act of the Legislature, did proceed under the provisions of said Act, to prepare and adopt maps, plans and diagrams, as pro-

97 vided in Section 7 of said Act, or did proceed, in form, to ascertain, determine, and separately state and set down, in a written report signed by them, the description and pretended cash value of the several lots and subdivisions of lands and buildings included in the land taken for the widening of said Dupont street, between the northerly line of Market street and the southerly line of Bush street, or the pretended damages done to the property along the line of said street, in form, but not in fact, as provided and required in said Act, or proceeded in form, but not in fact, to ascertain and set down in said report the description of the said several subdivisions or lots of land
98 included in the district designated in the proviso contained in Section 3 of said Act, with the sum or amount which said Board pretended to have estimated each lot, has been or will be benefited by reason of the widening of said street, or completed their report in form, as required by said Act, but aver, on the contrary, according to their information and belief, that said Board of Dupont Street Commissioners did, in strict compliance with the provisions of said Act, at the time and in the manner therein and thereby provided, prepare and adopt plans, maps and diagrams, as provided in Section 7 of said Act, and did proceed in form and in fact to ascertain,
99 determine and separately state and set down, in a written report signed by them, the description and actual cash value of the several lots and subdivisions of the lands and buildings included in the lands taken in the widening of said Dupont street, between the northerly line of Market street and the southerly line of Bush street, and the damages done to the property along the line of said street, in form and in fact, as provided in said Act of the Legislature, and did proceed, in form and in fact, and did, in form and in fact, ascertain, and set down in their said report, a description of the several subdivisions or lots of land included in the district designated in the proviso

100 contained in Section 3 of said Act, with the sum or amount which said Board actually estimated each lot, had been or would be benefited by reason of the widening of said street, and completed their said report, in form and in fact, as required in and by said Act of the Legislature; that said report of said Board of Dupont Street Commissioners was actual, real, and in fact, and not simply in form, simulated, or unreal, but the same was wholly and really made in conformity with the provisions of said Act of the Legislature, and at the time and in the manner prescribed thereby.

101 11th. And answering unto the *VII Subdivision* of said complaint, these Intervenors deny, according to their information and belief, that the taking of each of said lots for said widening, as therein mentioned, was in effect the same as taking thirty feet in depth from the rear of each of said larger lots, for the reason alleged or for any reason.

And these Intervenors deny, according to their information and belief, that the Commissioners, in fixing the value of the land to be taken, treated it as of the same value as a front lot of only thirty feet in depth, and deny that they estimated its value at about 200 per cent.
102 greater than it in fact was, or that they knowingly or wilfully or intentionally ascertained and determined the value of the lots taken to be three times as much as they in fact were, or that by reason of any matter or thing in said complaint alleged the cost of the said widening was made three times as great as it ought to have been, but aver, on the contrary, according to their information and belief, that said Commissioners did truly and justly ascertain and determine, according to their best judgment, the actual cash value of the land taken, and did estimate and set the same down in their said report, and did not estimate the value of any land so taken at 200 per cent., or at any per cent., or at all greater, than was the value

of the same in fact, and deny, according to their information and belief, that they did set down the value of any of the land so taken, knowingly or wilfully or intentionally, at any sum in excess of what the same was justly worth, according to their best judgment, or that said Commissioners, knowingly or wilfully or intentionally, or at all, or in any manner, in estimating the value of the land taken for the widening of said street, in any manner or respect departed from the provisions of the said Act of the Legislature, in said complaint alleged; or that by reason of any act or omission, knowingly or wilfully or intentionally, or otherwise, or at all, omitted or committed on the part of said Commissioners in and about the widening of said Dupont street, the cost of said widening was three times, or any time, or at all, greater than the same ought to have been.

12th. And answering unto the *VIII Subdivision* of said complaint, these Intervenors deny, according to their information and belief, that the said Board of Commissioners, in ascertaining and setting down in their said report the sum or amount in which each lot included in the lands in said complaint described had been or would be benefited by reason of the widening of said street, wilfully, or knowingly, or intentionally, adopted a false rule for the ascertainment thereof, or one which was or is not equal or uniform.

And deny, according to their information and belief, that, in estimating benefits, they did consider the lots which, by the widening, would become front lots, by reason of being given a frontage on the street as widened, as rear lots before the widening, or that they did consider the same as front lots, or as deriving only the same benefit as lots on the opposite side of the street which had already a frontage, or did wilfully or intentionally omit from their estimate of benefits to said lots, on the west side thereof, about two-thirds of the actual benefit de-

106 rived by them respectively, or any part of the benefit derived by them respectively, or at all; but aver, on the contrary, according to their information and belief, that they did, justly and truly, according to their best judgment, information and belief, honestly, and in good faith adopt a true and correct rule for the ascertainment of the benefits derived by said parcels of land, respectively, from said widening of said Dupont street, and did ascertain and set down against each lot the amount of benefit by each, respectively derived therefrom, and did not omit to set down against each lot the amount of benefit derived from said widening of said Dupont street.

107 13th. And, answering unto *Subdivision IX* of said complaint, these Intervenors deny, according to their information and belief, that said Board of Commissioners, in fixing the ratio of benefits on all and every portion of the property assessed for benefits in said report, did wilfully and knowingly, or wilfully or knowingly, adopt a false rule for the ascertainment thereof, as alleged or otherwise, or at all, or that they computed said benefits upon the increased value of the property after the widening, instead of upon the increase in value thereof, or that the effect of the adoption of the pretended

108 rule in this behalf in said complaint alleged, was, or is, to make the various assessments, or any of said assesments for benefits, grossly, or at all, unequal or wanting, in uniformity, or that the same was well known to said Commissioners, or to any of them, or that the same was intentional, or at all determined by them, or by any of them; but aver, on the contrary, according to their information and belief, that said Commissioners did, actually, ascertain and determine, according to their best judgment, in good faith, the amount of benefits derived to each of said parcels of land from the widening of said Dupont street, and did set the same down in their said report, and that in the ascertainment thereof, they, in

109 good faith, endeavored to act, and did act, according to a uniform and equal method for ascertaining the amount of benefits derived by each of said parcels of land, respectively, and not otherwise.

14th. And answering unto the *X Subdivision* of said complaint, these Intervenors deny, according to their information and belief, that said Board of Commissioners, after they had estimated in value all the costs and expenses which could properly or at all arise in said widening of said Dupont street, arbitrarily and illegally, or arbitrarily or illegally, added thereto the further sum of
110 $70,935, or any sum of money, or knowingly and wilfully, or knowingly or wilfully included the same, or any part of the same, in their estimate of the expenses of said widening, or that they did include therein any amount not authorized by said Act, or in any manner necessary for the work provided for in said Act, or did include in said report any amount of money not deemed necessary for said work, as said report was confirmed, or otherwise, or that there is included in the assessment for widening said street, or in said levy, any amount of money not deemed necessary for the widening of said street, and fully anthorized by the provisions of said Act
111 of the Legislature.

Deny, according to their information and belief, that said Board of Commissioners have so negligently and carelessly, or negligently or carelessly, managed their affairs, that they have permitted the whole, or a greater portion of said sum of $70,935, or any part thereof, to be drawn out, misappropriated, or converted, or utterly lost.

15th. And answering unto *Subdivision XI* of said complaint, these intervenors deny, according to their information and belief, that the notice that said report was open for the free inspection of all parties interested for the period of thirty days, was not published by said

112 Board daily for twenty days in two daily newspapers published in said City and County of San Francisco, or that the notice required in and by Section 7, of said Act, never was published in two papers, daily, for twenty days, as prescribed and required in and by said Act, but aver on the contrary, according to their information and belief, that said Board did duly publish the notice, and all notices, as provided and required in and by the provisions of said Act of the Legislature.

16th. And answering unto *Subdivision XII* of said complaint, these Intervenors deny, according to their information and belief, that upon the filing in the County
113 Court of the City and County of San Francisco, of the objections, or of any of them mentioned in said XII Subdivision of said complaint, to the report of said Board of Dupont Street Commissioners, or upon the proposals or threats or any of them, mentioned in said XII Subdivision of said complaint, to contest the report, before said County Court, that said Commissioners thereupon, to induce the objectors mentioned in said XII Subdivision of said complaint, or any of them, to withdaaw their said objections, or to prevent the matters, or any of the matters, alleged in said complaint, from becoming publicly known, secretly and
114 collusively, or fraudulently, or secretly, or collusively, or fraudulently, or at all, entered into any arrangement with said objectors, or any of them, by which said objectors agreed to withdraw their said objections, or any of their said objections, or that said Board of Commissioners, by their attorney, or otherwise, or at all, in consideration thereof, agreed to change, or procured to be changed, their said report as to the property of said objectors, or as to the property of any of them, so as to reduce or cause to be reduced, the amount of estimated benefits on the property of said T. H. Blythe from $97,380, as originally stated in said report, to $39,653; or to reduce or cause to be reduced, the amount of estimated benefits on

115 the property of Meetz and Simon, from $20,750, as stated in said report, to $15,758; or to reduce or cause to be reduced, the amount of estimated benefits on the property of William Sharp from $2,288 as stated in said report, to $2,038; or to reduce, or cause to be reduced, the amount of estimated benefits on the property of George W. Osborn from $17,444 as stated in said report, to $12,444; or to reduce, or cause to be reduced, the amount of estimated benefits on the property of James Phelan from $98,427, as stated in said report, to $78,427; or to reduce, or cause to be reduced, the amount of estimated benefits on the property of David Hunter, from $25,205, as stated in said report,
116 to $17,205; or to reduce, or cause to be reduced, the amount of estimated benefits on the propeaty of P. Marsicano from $15,844, as stated in the said report, to $11,-844; or to reduce, or cause to be reduced, the amount of estimated benefits on the property of L. Carivaux from $4,653, as stated in said report, to $3,400; or to increase, or cause to be increased, the estimated value of the property of James Phelan, taken for said widening, from $15,000, as stated in said report, to $25,000; or to increase, or cause to be increased, the estimated value of the property of Josephine Robinett, taken for said widening,
117 from $10,000, as stated in said report, to $20,000; or to increase, or cause to be increased, the valuation of the property of David Hunter, taken for said widening, from $2,438, as stated in said report, to $5,174; or that thereupon or in pursuance of said arrangement, said County Court entered an order, upon consent of said objectors, as to each objector, directing the said Board of Commissioners to modify said report, as above stated, or in accordance with said alleged arrangement.

And deny, according to their information and belief, that the judgment of said County Court was made or entered under or in pursuance of any fraudulent or collusive or secret arrangement, or any arrangement, to the

118 prejudice of any of the property owners affected in and by said widening of said Dupont street.

Deny according to their information and belief, that said changes, or any of said changes, were ordered by said County Court, upon the consent of said objectors and of said Commissioners alone, or without any investigation of the subject matter of said objections, or without any actual consideration of the merits, or without any proofs of any kind; aver, on the contrary, according to their information and belief, that the property owners, interested and concerned, in favor of, and in opposition to said objections, did fully
119 investigate the same and consult their counsel, learned in the law, with respect thereto, and that all and singular, the matters in this behalf, in said complaint alleged, were fully examined and considered by the parties in interest and their counsel, and by said County Court; deny, according to their information and belief, that said changes and alterations, or any of said changes, or any of said alterations, were made by said Board of Commissioners, or consented to as alleged, for the sole purpose, or for the purpose of inducing said persons to withdraw their objections, or to prevent an examina-
120 tion on the merits, or to prevent publicity as to said pretended frauds, or for the purpose, or with the design, that any of the persons affected by said assessment might not know thereof; or that the same might be approved or confirmed without their knowledge thereof; or that said orders, or any of them were, or was, in fact, obtained by fraud and collusion and imposition, or by any fraud or any collusion, or any imposition upon said Court.

Deny, according to their information and belief, that in making said changes and alterations, deductions and additions, a different mode of estimating the extent of the benefit from the value of the property taken, was applied to the property of said persons above named,

121 from that which was in said report applied to the property of other persons affected by said assessment to the great detriment and disadvantage, or to any detriment, or to any disadvantage of said other persons, or to the great detriment and disadvantage of the plaintiffs, or of any of them, or to the detriment, or to the disadvantage, or any detriment of the plaintiffs, or any of them, or that thereby, or by said changes and alterations, or by any of said changes, or by any of said alterations, the burden of assessment upon said other persons, or upon any of them, and property so assessed, was increased upwards of $125,000, or in any sum
122 of money at all, or that all equality or uniformity of assessment upon the various lots or subdivisions assessed, was destroyed, or that this was knowingly or intentionally done, or at all done by said Commissioners; and upon and according to their information and belief, these intervenors aver the truth and fact to be of and concerning said alleged changes and modifications, that after the filing of said report by said Commissioners in said County Court, the objectors in said complaint named, did file their written objections to the confirmation of said report; that thereupon the property owners affected in and by the widening of said Dupont
123 street, including the plaintiffs in this case and their predecessors in interest, by themselves and their counsel conferred and consulted with said objectors and their respective counsel, and examined and investigated into the grounds of said alleged objections, and after fully and carefully examining and considering said report and the objections thereto, and the widening of said Dupont street, by consent of all parties concerned, and for the purpose of avoiding greater expense, litigation, delay, loss and detriment to all parties concerned, did knowingly, understandingly and mutually consent and agree to said alleged changes and modifications, and

124 did thereupon present, or cause to be presented to said Dupont Street Commissioners and to said County Court, their petition in the words and figures following:

"SAN FRANCISCO, December 14th, 1876.

To the Board of Dupont Street Commissioners—GENTLEMEN: As property owners, assessed to pay for the proposed widening of Dupont Street, from Market to Bush street, we respectfully, but earnestly urge upon you the necessity of completing the widening immediately. It has come to our knowledge that obstacles have been interposed to the confirmation of your report to the County
125 Judge by certain property owners, who require changes in the assessment for damages and benefits. In all of these we deem it best that concessions be made in every case, rather than the widening should be jeopardized, and to that end all concessions, and to any extent that you may make, will, in view of the urgency of the improvements, meet with our hearty approval and support."

Which petition, as these intervenors are informed and verily believe, was presented to said Dupont Street Commissioners, and to said County Court as aforesaid, by and on behalf of all the property owners concerned or affected
126 by the widening of said Dupont street, including the plaintiffs herein and their predecessors in interest.

17th. And these Intervenors answering unto *Subdivision XIII* of said complaint, deny, according to their information and belief, that while said Thomas H. Blythe was claiming, or about to claim, in said County Court, that said Board, in estimating the value of property taken, had adopted the wrong rule in estimating the value thereof, as alleged in said Subdivisions 7 and 8 of said complaint, or at any time said Board of Commissioners, or any of them, to induce said Blythe to withdraw his objections, or any of his objections, entered into an arbitration with said Blythe, or entered into an agree-

127 ment by and between them and said Blythe, whereby D. C. McRuer, Thos. D. Matthewson and Eugene McCarthy were appointed arbitrators, or that it was submitted to them as arbitrators, to determine what amount of the fair and legitimate cost of widening the street should be assessed upon the property of said Blythe, or that it was agreed by said Board, in the matter of said arbitration, that said arbitrators, in making their determination, should consider the whole subject of allowance for damages to land and the apportionment of benefits to the same as though nothing had been done in the premises by anyone theretofore, or that said arbitrators should
128 take, as a basis for allowing damages, the difference in value between the lots on the west side of said Dupont street as they were before the widening, and the value of the same lots diminished in depth thirty feet.

These Intervenors deny, according to their information and belief, that said McRuer, Matthewson and McCarthy, as arbitrators, proceeded to make estimates, or found, or ascertained, or reported to said Board of Commissioners that the value of the whole land taken for said widening of Dupont street was only $246,240, instead of $639,913; and these Intervenors deny,
129 according to their information and belief, that said McRuer, Matthewson and McCarthy, as arbitrators, found, or ascertained, or reported to said Board of Commissioners that said Blythe's property would be benefited, or should pay only the sum of $39,653, instead of $97,308, as found by said Board of Commissioners.

These Intervenors aver, according to their information and belief, that said McRuer, Matthewson and McCarthy did not act as arbitrators, as alleged in the thirteenth Subdivision of said complaint, and that the whole action of said McRuer, Matthewson and McCarthy in and about the premises was simply advisory to the said Board of Commissioners, and in no way binding upon them, and

130 was not made by said McRuer, Matthewson and McCarthy, as arbitrators, or in any other capacity than as advisers to the said Board of Commissioners.

These Intervenors deny, according to their information and belief, that the parties affected by said assessment, other than said Blythe, had no notice of the matters in said thirteenth Subdivision of the complaint alleged, or no opportunity to contest the same, or to be heard thereon.

These Intervenors deny, according to their information and belief, that the matters alleged in the thirteenth Subdivision of said complaint, or the whole thereof, or
131 any part thereof, was concealed by said Board of Commissioners, or by any of them, from the plaintiffs, or from any of the plaintiffs, or from the persons whose property was or is affected by said assessment, or from any of such persons.

These Intervenors deny, according to their information and belief, that said Board of Commissioners, for the purpose of inducing said Blythe to withdraw his exceptions, as stated in the twelfth Subdivision of the complaint, consented to change or diminish the amount of the estimated benefits on the property of said Blythe from $97,308 to
132 $39,653, or consented to make any change in the amount of the estimated benefits on the property of said Blythe, for the mere purpose of inducing said Blythe to withdraw his exceptions to the report of said Commissioners; on the contrary, these Intervenors aver, according to their information and belief, that the whole action of the said Board of Commissioners in the matter of the assessment of said Blythe, was in good faith, and for the purpose of correctly assessing the property of said Blythe to be benefited by said widening of Dupont street.

18th. These Intervenors, in answer to the *XIV Subdivision* of the complaint, deny, according to their information and belief, that said Board of Commissioners

133 never did in fact, or that no member of said Board ever did, ascertain or determine the value of the several lots or subdivisions of land, or any of them, or buildings, or any of them, included in the land taken for the widening of said Dupont street, or the damage done to the property along the line of said Dupont street, or any of it, or the amount which said lots assessed, or any of them, would be benefited by reason of the widening of said Dupont street.

These Intervenors deny, according to their information and belief, that said Board of Commissioners did not themselves personally examine into said matters, or
134 employed certain persons, whom they called or designated experts, to ascertain or determine all or singular said matters for them; or that said Board of Commissioners adopted the estimates of said experts as to all or any of said matters, or embodied them in their said report without ever, in fact, having made any estimate of their own thereupon.

On the contrary. these Intervenors aver, according to their information and belief, that all the matters embraced in and set forth in the report of said Board of Commissioners as to the widening of said Dupont street,
135 were matters which were ascertained, determined, and personally examined and estimated, by said Board of Commissioners themselves; and that the said report of the said Board of Commissioners, as to the widening of said Dupont street, was the result of personal estimate and decision and judgment of said Board of Commissioners, and of no other person or persons whomsoever.

19th. And as to the matters set forth in *Subdivision XV* of said complaint, these Intervenors deny, according to their information and belief, that at the dates or times in the complaint mentioned, or at any of them, A. J. Bryant was the owner of, or interested in, any lands on the west side of Dupont street, or in any lands which

136 were taken for the widening of said Dupont street, or that said A. J. Bryant was interested in any of the lands on the west side of Dupont street which were taken for the widening thereof; and the title of which stood of record in the names of persons, or of any person, other than the said Bryant.

These Intervenors deny, according to their information and belief, that said A. J. Bryant was interested in the lot on the northwest corner of Dupont and O'Farrell streets, or in any portion of said lot, or that Richard Ivers ever acted as the agent of said A. J. Bryant in purchasing from one John Griffin any property on the
137 west side of Dupont street, or the lot on the northwest corner of Dupont and O'Farrell streets, or that said Bryant was, jointly or at all, interested with said Richard Ivers in the purchase of said lot at the northwest corner of Dupont and O'Farrell streets, or in the purchase of any lot on the west side of Dupont street, or in the purchase of any lot which was taken for or affected by the widening of said Dupont street.

These Intervenors deny, according to their information and belief, that said A. J. Bryant was interested in any lot on Dupont street; the title of which was taken,
138 or stood in the name of Robert Watt and Francis Berton, or in the name of either of them.

These Intervenors deny, according to their information and belief, that Robert Watt and Francis Berton advanced any money to A. J. Bryant or to A. J. Bryant and Richard Ivers jointly, for the purchase of any property situated on the west side of Dupont street, or on the northwest corner of Dupont and O'Farrell streets.

These Intervenors aver, according to their information and belief, that in the month of September, 1876, said Richard Ivers purchased from John Griffin, for the sum of $75,000, the lot situated at the northwest corner of Dupont and O'Farrell streets, which last mentioned lot

had a frontage of 36 feet 6 inches on Dupont street, by a depth of 80 feet on O'Farrell street, but the fact of said purchase by said Richard Ivers was public and notorious. That said Richard Ivers, at the time of said purchase, offered to A. J. Bryant a joint interest in the same, which the said A. J. Bryant then and there declined, but agreed to endorse the promissory notes of said Richard Ivers for $60,000, payable in three and twelve months, upon the condition that the Swiss American Bank would advance the face of said notes to said Ivers and take as security for payment of said notes the fee simple title of said lot on the northwest corner of Dupont and O'Farrell streets in its own name and the further security of $35,000 collaterals belonging to said Richard Ivers, then in possession of said Swiss American Bank; that thereafter said Swiss American Bank demanded as additional precaution, that the said A. J. Bryant should become a joint maker of said notes for $35,000, instead of being merely the indorser thereon, and that thereupon the said A. J. Bryant, as an accommodation to said Richard Ivers, and not otherwise, and knowing that the security to said bank was abundant for the said loan, and that he, the said Bryant, incurred no risk in becoming a joint maker of said notes, did sign said notes, as the joint maker thereof, with the said Ivers; that thereafter, on the 2d day of August, 1877, said Richard Ivers made a mortgage upon said lot, at the northwest corner of Dupont and O'Farrell streets, to the Odd Fellows' Bank, to secure to the last mentioned bank the sum of $35,000, then and there loaned by said Odd Fellows' Bank to said Richard Ivers, and with that money, and the proceeds of the collaterals aforesaid, then previously held by the Swiss American Bank, and from resources of his own, the said Ivers took up the joint notes of himself and the said Bryant to the said Swiss American Bank, and cancelled the same, and that the whole action of said A. J. Bryant in the matter of assisting said

142 Richard Ivers to raise money for the purpose of carrying out and effectuating his purchase from said John Griffin, was merely as a friendly act to said Ivers, and not because of any interest, actual or contingent, of said Bryant in said purchase.

These Intervenors deny, according to their information and belief, that said A. J. Bryant was not a disinterested commissioner in the matter of said improvements, to-wit: the widening of Dupont street, or that he acted in any or all of said matters as a judge in his own cause.

These Intervenors deny, according to their information and belief, that the said A. J. Bryant was interested
143 in any pieces of property affected by said assessment for the widening of Dupont street, the title to which was ever concealed, or held in the name of any person, or persons, unknown to the plaintiffs, or in the name or names of any third persons.

These Intervenors admit, according to their information and belief, that for seven or eight years last preceding the passage of the Statute of California, under which said Dupont street was widened, said A. J. Bryant was the owner, jointly with one G. L. Bradley, one of the plaintiffs in this action, of that certain lot situate on the
144 northeast corner of Morton and Dupont streets, having a frontage of 20 feet on Dupont street by 60 feet on Morton street.

These Intervenors aver, according to their information and belief, that the assessment of the Board of Commissioners for the widening of Dupont street upon last mentioned lot, was according to the general scale of assessment adopted for the property along the east line of Dupont street, and that the assessment for the last mentioned lot was perfectly fair and just, and the said Bryant's and Bradley's ownership of the lot last mentioned, was a notorious fact, and appeared upon all the maps and reports made, or caused to be made, by said Board of

145 Commissioners, in the widening of said Dupont street, and was also published in the daily papers in their account of the assessments and proceedings of said Board of Commissioners.

These Intervenors deny, according to their information and belief, that the portion of the aforesaid lot at the northwest corner of Dupont and O'Farrell streets, after cutting therefrom thirty feet for the widening of said Dupont street, was worth sixty thousand dollars, or any sum greater than fifty-five thousand dollars, but that this value of fifty-five thousand dollars is, and was, incumbered by the lien and charge upon said lot for the widen-
146 ing of Dupont street, which lien and charge amounts, in the aggregate, to the sum of nineteen thousand five hundred dollars.

20th. These Intervenors, in answer to the matters set forth in the *XVI Subdivision* of said complaint, deny, according to their information and belief, that said Board of Dupont Street Commissioners never acquired jurisdiction to widen said Dupont street, or any portion thereof; or that the notices, or any of them, mentioned in said complaint and called for by the statute for the widening of said Dupont street were not given as alleged in said
147 complaint, but on the contrary, these Intervenors aver, according to their information and belief, that said notices, and every of them, were duly and properly given.

These Intervenors aver, according to their information and belief, that, by the report of said Board of Dupont Street Commissioners as confirmed the total cost of said improvements for the widening of Dupont street with the expense of the same, was fixed and assessed by their report at nine hundred and fourteen thousand nine hundred and forty-one dollars; but that to provide for the interest, which became payable on the first day of July, 1877, upon the bonds authorized to be issued under the aforesaid statute, and in

148 view of the fact that said bonds were not saleable at a higher price than 95 per cent. on their par value, it became necessary, in order to effectuate and carry out the intention of said statute, and to provide for the payment of the interest accrued on the first day of July, 1877, on the aforesaid bonds, to issue bonds to the amount of one million of dollars, in order that the sum of $950,000 might be actually realized, by and from said assessment, and for these reasons the amount of bonds issued by the Commissioners authorized to issue said bonds, was fixed at one million of dollars; and in further explanation of the matters alleged in the 18th subdivision of said com-
149 plaint, these Intervenors further aver, that on the 20th day of December, 1876, the final report of said Board of Dupont Street Commissioners was fully confirmed by the final judgment of the County Court of the City and County of San Francisco.

The said County Court, by its said final judgment of December 20, 1876, adjudicates, among other things, as follows:

1st. That on the 1st day of May, 1876, the Board of Supervisors of the City and County of San Francisco, duly passed an order, which was duly approved on the 3d day of May, 1876, by A. J. Bryant as Mayor and *ex-*
150 *officio* President of said Board of Supervisors, wherein and whereby said Board of Supervisors declared it to be expedient that Dupont street, in said City and County of San Francisco, be widened, under and in accordance with, and to the extent and under the conditions prescribed in that certain Statute of the State of California, entitled "An Act to authorize the widening of Dupont street, in the City of San Francisco," approved March 23, 1876.

2d. That the said Board of Dupont Street Commissioners had duly caused to be published the notice required, and for the period required, by the sixth section of last mentioned Statute of March 23d, 1876.

151 3d. That the said Board of Dupont Street Commissioners had completed its report on the 23d day of September, 1876, and that as soon as the same was completed, had left it at the office of said Board, daily, during ordinary business hours, for thirty days, to-wit: from the 23d day of September, 1876, up to and including the 27th day of October, 1876, for the free inspection of all parties interested, and that notice that said report was so open for inspection for such time and at such place was duly published by said Board, daily, for twenty days, in two daily newspapers, printed and published in said City and County of San Francisco, to-wit: from the 23d day
152 of September, 1876, to the 17th day of October, 1876, both inclusive, as required by said Statute of March 23, 1876.

4th. That the gross amount of damages for the widening of Dupont street, between Bush and Market streets, was $914,991.80, and that the amount allowed by said Board for attorney's fees, salary of Secretary, expenses of experts, and all other amounts as appeared in said report, including such contingent expenses as might be necessarily incurred in closing the labors of said Board, was fair, reasonable and just.

153 5th. That the gross amounts of benefits assessed against the property described in the report of benefits of said Board was $796,837.

6th. That all the proceedings taken by said Board had been duly and legally taken, and that all the acts, matters and things provided by said Statute of March 23d, 1876, to be done and performed by said Board in the premises, had, on the part of said Board, been duly and regularly done and performed in the forms, at the times, and in the manner prescribed by said Statute of March 23d, 1876.

7th. That the report of said Dupont Street Commissioners in the matter of the widening of Dupont street,

154 filed in said County Court, on the 27th day of October, 1876, as modified by said Board, under orders of said County Court theretofore made, and as the same then existed on file in said County Court, should be fully and in all respects, approved and confirmed.

These Intervenors further aver, that after the aforesaid final judgment of said County Court, and during the first seven months of the year 1877, the said Dupont street, between Market and Bush streets, was actually widened from an original width of forty-four feet to a width of seventy-four feet, measuring westerly from the original and present easterly line of said Dupont street, and that
155 the space so added to said Dupont street was taken from the land along the westerly side thereof; that in obedience to the final report of said Board of Dupont Street Commissioners, and to said final judgment of said County Court, all the owners of lots and buildings along the original westerly line of said Dupont street, and between Market and Bush streets, acquiesced in said widening of Dupont street, and during the first seven months of the year 1877, removed all their respective buildings and improvements from the said additional belt, thirty feet in width, so added to Dupont street on the westerly side
156 thereof, and absolutely surrendered said additional belt of ground to the uses and purposes of a public street, and as an addition to said Dupont street, and all this as early as the 31st day of July, 1877.

These Intervenors further aver, that since the surrender last mentioned, and since the month of July, 1877, the said addition to Dupont street has constituted a part thereof, and has been devoted to the uses and purposes of a public street, and has been used, and still is used as such by the plaintiffs herein, and by the public at large; and that ever since the month of July, 1877, the plaintiffs have had and enjoyed, and do still have and enjoy all the benefit and advantage which

157 has accrued and does accrue to their respective lots described in the complaint herein, from the aforesaid widening of Dupont street.

These Intervenors further aver, that since the said final judgment of said County Court, and previous to the 1st day of November, 1877, there had been constructed along the new westerly line of Dupont street, between Bush and Market streets (that is along the new westerly line, established for Dupont street by said widening), at a cost of about eight hundred thousand dollars, twenty new brick buildings, one of which is five stories in height, twelve of which are four stories in height, six of which
158 are three stories in height and one of which is two stories in height. That said twenty new brick buildings contain on their first or ground floor thirty-nine rooms suitable for, and intended for, and most of which are now occupied as stores or shops.

These Intervenors further aver that since said final judgment of said County Court, and upon the faith thereof, the said Board of Dupont Street Commissioners have caused to be prepared and issued, in accordance with the provisions of the aforesaid Statute of March 23d, 1877, and for the purpose of thereby paying and discharging all the damages, costs aad expenses of the said widening
159 of Dupont street, one thousand bonds of the City and County of San Francisco, each of which bonds bears date the first day of January, 1876, (which is the date on which each of said bonds was issued), and is for the sum of one thousand dollars, and is payable in gold coin of the United States twenty years from the date thereof, and bears interest in like gold coin at the rate of seven per cent. per annum, payable half yearly, on the first day of July and the first day of January of each year, upon interest coupons attached to each of said bonds, and the principal and interest of each of said bonds is payable at the office of the Treasurer of the City and County of

160 San Francisco, and each of said bonds is executed under the official seal of the City and County of San Francisco, and is subscribed by the Mayor, the Auditor and the City and County Surveyor of said City and County of San Francisco, constituting the Board of Dupont Street Commissioners.

These Intervenors further aver, that during the first six months of the year 1877, the Mayor, Auditor and Treasurer of said City and County of San Francisco did sell and dispose of said one thousand bonds, in accordance with the requirements and provisions, and for the purposes expressed, in said statute of March 23d, 1876;
161 and all this before any question was raised by plaintiffs, or by any of them, or by any one else, as to the validity of the proceedings, under the last-mentioned statute, for the said widening of Dupont street, or as to the validity of the said widening of Dupont street, or as to the validity of said bonds, or as to the validity of the assessments to pay the interest and one-twentieth of the principal of said bonds.

These Intervenors further aver, according to their information and belief, that the greater part of said one thousand bonds have, according to their in-
162 formation and belief, been purchased and paid for, and are now held, by innocent holders, who purchased and paid for the said bonds in the Fall of 1877 and during January and February, 1878, and who, at the time they so purchased and paid for said bonds, had no knowledge or notice, either actual or constructive, either express or implied, of any defect, or vice, or impurity, or fraud in said bonds, or in any of them, or in any of the acts, doings or proceedings which led to the issuance of said bonds; on the contrary, these Intervenors aver, according to their information and belief, that last mentioned holders and purchasers of said bonds purchased and paid for the same, and every of them, in good faith, and in the

163 full belief that all the prerequisites to the issuance of said bonds, and the issuance of every of them, had been fully complied with, and that said bonds were good and valid and negotiable bonds.

21st. And as to *Subdivision XIX* of said complaint, these Intervenors deny, according to their informati on and belief, that said proceedings constitute an apparent lien upon all said real estate of plaintiffs; but aver, according to their information and belief, that the same are in fact a real lien upon said lands; and deny, according to their information and belief, that said proceedings, or any of
164 the same, constitute or work a cloud upon the title of plaintiffs, or the title of any of them, to their respective lots, or work an irreparable injury thereto, or to any of the same.

22d. And answering unto *Subdivision XX* of said complaint, these Intervenors deny, upon and according to their information and belief, that said plaintiffs, and every of them, had not knowledge of the facts alleged in paragraphs 7, 8, 9, 10, 11, 12, 13, 14 and 15 of said complaint, or that the same were not discovered or not known to plaintiffs, and to every of them, prior to April 5th, 1878; but aver, on the contrary, according to their infor-
165 mation and belief, that the same, and every of the matters and things in said last mentioned nine subdivisions of the complaint, respectively set forth, were known to plaintiffs, and to every of them, at the respective times the same occurred. And these Intervenors deny, according to their information and belief, that said plaintiffs, and every of them, have not acquiesced in said assessment, or have never consented thereto; and aver, on the contrary, according to their information and belief, that they and every of them have consented thereto, and to all and singular the matters and proceedings in and about the widening of said Dupont street.

23d. And these Intervenors, answering unto *Sub-*

division XXII of said complaint, deny, according
166 to their information and belief, that said assessment is so onerous and excessive, or so onerous or excessive, that it amounts practically, or at all, to confiscation of the property of these plaintiffs, or of any of them; deny, according to their information and belief, that the income of the plaintiffs, or any of them, from their property affected by said assessment, is now insufficient to pay the ordinary taxes levied upon said property, or any of the same, and this assessment; or that said assessment if maintained, would take the whole income of the respective properties of said plaintiffs, or of any of them, for
167 twenty years, to pay said assessment and taxes, or that their property, or the property of any of them, will be practically, or at all, confiscated thereby.

Wherefore, these Intervenors pray, the premises considered, that plaintiffs take nothing by this action, and that judgment be rendered against them for costs.

McAllister & Bergin,
Attys. for Intervenors.

State of California, } ss.
City and County of San Francisco, }

D. O. Mills, Jacob Rosenberg, Charles Lux, Joseph Rosenberg, Wm. A. Piper and Charles F. MacDermot, being
168 each duly and severally sworn, depose and say, and each for himself, and not one for the other, deposes and says, that he has heard read the foregoing Complaint in Intervention, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on the information and belief of the Intervenors, and as to those matters that he believes it to be true.

D. O. Mills,
Joseph Rosenberg,
W. A. Piper,
C. F. MacDermot.

Subscribed and sworn to, before me, this 13th day of August, A. D. 1880.

[SEAL.] J. H. BLOOD,
Notary Public.

STATE OF CALIFORNIA, } ss.
City and County of San Francisco, }

D. O. Mills being first duly sworn, deposes and says that he is the Treasurer of the University of California; that he has heard read the foregoing Complaint in Intervention, and knows the contents thereof, and the same is true of his own knowledge, except as to the matters which are therein stated on the information and belief of the Intervenors, and as to those matters that he believes it to be true.

D. O. MILLS.

Subscribed and sworn to before me this 13th day of August, A. D. 1880.

[SEAL.] J. H. BLOOD,
Notary Public.

[Endorsed.]

Service of within Complaint in Intervention, admitted this 13th day of August, A. D. 1880.

GARBER, THORNTON & BISHOP,
Attys. for Plaintiffs.

Filed Aug. 13, 1880.

WILLIAM A. STUART,
Clerk.

By S. SHAEN,
Deputy Clerk.

[Title of Court and Cause.]

ANSWER.

The defendant in the above entitled action, for answer to the complaint of the plaintiffs therein, and in answer

to paragraph four of said complaint, denies that the
172 Board of Supervisors of the City and County of San Francisco did not, by resolution or order, within 60 days after the passage of said Act, or at any other time, express its judgment, or any judgment, that it would be expedient that Dupont street should be widened in accordance with, or in the mode prescribed by said Act, or at all, and denies that said Board of Supervisors failed within said period of sixty days after the passage of said act to pass any resolution, or adopt any order, declaring it expedient to widen Dupont street under the provisions of said Act, and denies that by reason thereof, or by reason of any matter or thing in said complaint alleged,
173 said Board of Dupont Street Commissioners mentioned in the Act of the Legislature, in said complaint alleged, never were constituted a legal Board or never were authorized to act under the provisions of said Act, but aver on the contrary, that said Board of Supervisors within 60 days next after the passage of said Act of the Legislature, did by resolution and order, express its judgment that it would be expedient that Dupont street be widened in accordance with, and in the mode prescribed by said Act of the Legislature, and avers that said Board of Dupont Street Commissioners did become, and was a legal
174 Board, and were duly authorized to act under and by virtue of the provisions of said Act of the Legislature.

And as to paragraph five of said complaint, defendant denies that under said Act the said Board of Dupont Street Commissioners, though wholly without authority, proceeded to act as such Board, under the provisions of said Act, but avers, on the contrary, that said Board of Dupont Street Commissioners proceeded to act, and did act, under and in pursuance of the provisions of said Act of the Legislature, and were lawfully authorized thereunto by the provisions of said Act of the Legislature, and they did act in conformity there-

175 with, and not otherwise, and denies that said Board of Dupont Street Commissioners did not, at any time, publish in the daily papers of said City and County of San Francisco, for a period of ten days, the notices to property owners required by section six of said Act, or any notice in that behalf, and avers, on the contrary, that said Board of Dupont Street Commissioners did, at the time and in the manner prescribed in and by the provisions of said Act of the Legislature, publish the notice to property owners required by the provisions of section six of said Act of the Legislature, and in strict conformity therewith.

176 And answering unto the sixth paragraph of said complaint, defendant denies that said Board of Dupont Street Commissioners, without publication of the notice to property owners required by the provisions of section six of said Act, or without being thereunto duly authorized, under and by virtue of the provisions of said Act of the Legislature, did proceed, under the provisions of said Act, to prepare and adopt maps, plans and diagrams, as provided in Section 7 of said Act, or did proceed, in form, to ascertain, determine and separately state and set down in a written report signed by them, the description and pretended
177 cash value of the several lots, and subdivisions of lands and buildings, included in the land taken for the widening of said Dupont street, between the northerly line of Market street and the southerly line of Bush street, or the pretended damages done to the property along the line of said street, in form, but not in fact, as provided and required in said Act, or proceeded in form, but not in fact, to ascertain and set down in said report the description of the said several subdivisions or lots of land, included in the district designated in the proviso contained in Section 3, of said Act, with the sum or amount which said Board pretended to have estimated each lot, has been or will be benefited by reason of the widening

of said street, or completed their report, in form, as required by said Act, but aver, on the contrary, that said Board of Dupont Street Commissioners did, in strict compliance with the provisions of said Act, at the time and in the manner therein and thereby provided, prepare and adopt plans, maps and diagrams, as provided in Section 7 of said Act, and did proceed in form and in fact to ascertain, determine and separately state and set down in a written report, signed by them, the description and actual cash value of the several lots and subdivisions of the lands and buildings, included in the lands taken in the widening of said Dupont street, between the northerly line of Market street and the southerly line of Bush street, and the damages done to the property along the line of said street, in form and fact, as provided in said Act of the Legislature, and did proceed, in form and in fact, and did in form and in fact, ascertain and set down, in their said report, a description of the several subdivisions or lots of land, included in the district designated in the proviso contained in Section 3 of said Act, with the sum or amount which said Board actually estimated each lot had been or would be benefited by reason of the widening of said street, and completed their said report, in form and in fact, as required in and by said Act of the Legislature; that said report of said Board of Dupont Street Commissioners was actual, real, and in fact; and not simply in form, simulated or unreal, but the same was wholly and really made, in conformity with the provisions of said Act of the Legislature, and at the time and in the manner prescribed thereby.

And answering unto the seventh paragraph of said complaint, denies that the taking of each of said lots, for said widening, as therein mentioned, was, in effect, the same as taking thirty feet in depth from the rear of each of said larger lots, for the reason alleged or for any reason.

181 And denies that the Commissioners, in fixing the value of the land to be taken, treated it as of the same value as a front lot of only 30 feet in depth, and denies that they estimated its value at about 200 per cent. greater than it in fact was, or that they knowingly and wilfully or intentionally ascertained and determined the value of the lots taken to be three times as much as they in fact were, or that by reason of any matter or thing in said complaint alleged, the cost of the said widening was made three times as great as it ought to have been, but avers on the contrary, that said Commissioners did truly and justly ascertain and determine, ac-
182 cording to their best judgment, the actual cash value of the land taken, and did estimate and set the same down in their said report, and did not estimate the value of any land so taken at 200 per cent., or at any per cent., or at all, greater than was the value of the same in fact; and deny that they did set down the value of any of the land so taken knowingly, wilfully or intentionally, at any sum in excess of what the same was justly worth, according to their best judgment; and denies that said Commissioners knowingly, wilfully, intentionally, or at all, or in any manner, in estimating the value of the land taken
183 for the widening of said street, in any manner or respect departed from the provisions of the said Act of the Legislature, in said complaint alleged; and denies that by reason of any act or omission, knowingly, wilfully or intentionally, or otherwise, or at all, omitted or committed on the part of said Commissioners in and about the widening of said Dupont street, the cost of said widening was three times, or any time, or at all, greater than the same ought to have been.

And, answering unto the 8th paragraph of said complaint, denies that the said Board of Commissioners, in ascertaining or setting down in their said report the sum or amount in which each lot included in the lands in said

184 complaint described had been or would be benefited by reason of the widening of said street, wilfully, knowingly, or intentionally, adopted a false rule for the ascertainment thereof, or one which was or is not equal or uniform.

And denies, that in estimating benefits, they did consider the lots which, by the widening, would become front lots, by reason of being given a frontage on the street, as widened, as rear lots, before the widening, or that they did consider the same as front lots, or as deriving only the same benefits as lots on the opposite side of the street which had already a frontage, or did wilfully
185 or intentionally, omit from their estimate of benefit to said lots, on the west side thereof about two-thirds of the actual benefit derived by them respectively, or any part of the benefit derived by them, respectively, or at all; but aver, on the contrary, that they did, justly and truly, according to their best judgment, information and belief, honestly, and in good faith, adopt a true and correct rule for the ascertainment of the benefits derived by said parcels of land, respectively, from said widening of said Dupont street, and did ascertain and set down against each lot the amount of benefit by each, respectively, derived therefrom, and did
186 not omit to set down against each lot the amount of benefit derived from said widening of said Dupont street.

And, answering unto paragraph 9 of said complaint, denies that said Board of Commissioners, in fixing the ratio of benefits on all and every portion of the property assessed for benefits in said report, did, wilfully and knowingly, or wilfully or knowingly, adopt a false rule for the ascertainment thereof, as alleged, or otherwise, or at all, or that they computed said benefits upon the increased value of the property after the widening, instead of upon the increase in value thereof, or that the effect of the adoption of the pretended rule in this behalf in said com-

187 plaint alleged, was, or is, to make the various assessments, or any of said assessments for benefits, grossly, or at all, unequal, or wanting in uniformity, or that the same was well known to said Commissioners, or to any of them, or that the same was intentional or at all determined by them, or by any of them; but avers, on the contrary, that said Commissioners did, actually, ascertain and determine, according to their best judgment, in good faith, the amount of benefits derived to each of said parcels of land from the widening of said Dupont street, and did set the same down in their said report, and that in the ascertainment thereof, they, in good faith, endeavored to
188 act, and did act, according to a uniform and equal method for ascertaining the amount of benefits derived by each of said parcels of land, respectively, and not otherwise.

And answering unto the 10th paragraph of said complaint, defendant denies that said Board of Commissioners, after they had estimated in value all the costs and expenses which could properly or at all arise in said widening of said Dupont street, arbitrarily and illegally, or arbitrarily or illegally, added thereto the further sum of $70,935, or any sum of money, or knowingly and wilfully, or knowingly or wilfully, included the same, or any part
189 of the same, in their estimate of the expenses of said widening, or that they did include therein any amount not authorized by said Act, or in any manner necessary for the work provided for in said Act, or did include in said report any amount of money not deemed necessary for said work, as said report was confirmed, or otherwise, or that there is included in the assessment for widening said street, or in said levy, any amount of money not deemed necessary for the widening of said street, and fully authorized by the provisions of said Act of the Legislature.

Denies that said Board of Commissioners have so negligently and carelessly, or negligently or carelessly, managed their affairs that they have permitted the whole, or

190 a greater portion, of said sum of $70,935, or any part thereof, to be drawn out, misappropriated and converted or utterly lost.

And answering unto paragraph eleven of said complaint, defendant denies that the notice that said report was open for the free inspection of all parties interested for the period of thirty days, was not published by said Board daily for twenty days in two daily newspapers published in said City and County of San Francisco, and denies that the notice required in and by Section 7 of said Act never was published in two papers daily for twenty days, as prescribed and required in and
191 by said Act; but avers, on the contrary, that said Board did duly publish the notice, and all notices, as provided and required in and by the provisions of said Act of the Legislature.

And answering unto paragraph twelve of said complaint, defendant denies that thereupon, or at all, said Commissioners, or any of them, to induce said objectors, or any of them, to withdraw their said objections, or to prevent said matters, or any of said matters, from becoming publicly known, secretly and collusively and fraudulently, or secretly or collusively or fraudulently, or at all, entered into any arrangement with said objectors, or any
192 of them, by which said objectors agreed to withdraw their said objections, or any of their said objections, or that said Board of Commissioners, by their attorney or otherwise, or at all, in consideration thereof, agreed to change, or procured to be changed, their said report as to the property of said objectors, or as to the property of any of them, so as to reduce, or cause to be reduced the amount of estimated benefits on the property of said T. H. Blythe from $97,380, as originally stated in said report, to $39,653, or to reduce or cause to be reduced the amount of estimated benefits on the property of said Meetz and Simon, from $20,750, as stated in said report,

193 to $15,758; or to reduce or cause to be reduced the amount of estimated benefits on the property of said William Sharp, from $2,288, as stated in said report, to $2,038; or to reduce or cause to be reduced the amount of estimated benefits on the property of said George W. Osbourne, from $17,444, as stated in said report, to $12,-444; or to reduce or cause to be reduced the amount of estimated benefits on the property of said James Phelan, from $98,427, as stated in said report, to 78,427; or to reduce or cause to be reduced the amount of estimated benefits on the property of said David Hunter, from $25,205, as stated in said report, to $17,205; or to reduce
194 or cause to be reduced the amount of estimated benefits on the property of said P. Marsicano, from $15,844, as stated in the said report, to $11,844; or to reduce or cause to be reduced the amount of estimated benefits on the property of said L. Carivaux, from $4,653, as stated in said report, to $3,400; or to increase or cause to be increased the estimated value of the property of said James Phelan, taken for said widening, from $15,000, as stated in said report, to $25,000; or to increase or cause to be increased the estimated value of the property of Josephine Robinet, taken for said
195 widening, from $10,000, as stated in said report, to $20,000; or to increase, or cause to be increased, the valuation of the property of David Hunter, taken for said widening, from $2,438, as stated in said report, to $5,174; or that thereupon or in pursuance of said arrangement said County Court entered an order, upon consent of said objectors, as to each objector, directing the said Board of Commissioners to modify said report as above stated, or in accordance with said alleged arrangement.

And denies that the judgment of said County Court was made or entered under or in pursuance of any fraudulent, collusive or secret arrangement, or any arrangement, to the prejudice of any of the property own-

196 ers affected in and by said widening of said Dupont street.

Denies that said changes, or any of said changes were ordered by said County Court, upon the consent of said objectors and of said Commissioners alone, or without any investigation of the subject matter of said objections, or without any actual consideration of the merits, or without any proofs of any kind; avers, on the contrary, upon and according to his information and belief, that the property owners interested and concerned, in favor of and in opposition to said objections, did fully investigate the same and consult their counsel, learned in the
197 law, with respect thereto, and that all and singular the matters in this behalf, in said complaint alleged, were fully examined and considered by the parties in interest and their counsel, and by said County Court; denies that said changes and alterations, or any of said changes, or any of said alterations, were made by said Board of Commissioners, or consented to as alleged, for the sole purpose, or for the purpose of inducing said persons to withdraw their objections, or to prevent an examination on the merits, or to prevent publicity as to said pretended frauds, or for the purpose or with the design that any of the persons affected by said assessment might not know
198 thereof; or that the same might be approved or confirmed without their knowledge thereof; and denies that said orders, or any of them were, or was, in fact, obtained by fraud and collusion and imposition, or by any fraud or any collusion or any imposition upon said Court.

Denies that in making said changes and alterations, deductions and additions, a different mode of estimating the extent of the benefits from the value of the property taken was applied to the property of said persons above named from that which was in said report applied to the property of other persons affected by said assessment to the great detriment and disadvantage, or to any detri-

ment, or to any disadvantage, of said other persons, or to the great detriment and disadvantage of the plaintiffs, or of any of them, or to the detriment or to the disadvantage, or any detriment, of the plaintiffs, or any of them, or that thereby, or by said changes and alterations, or by any of said changes, or by any of said alterations, the burden of assessment upon said other persons, or upon any of them, and property so assessed, was increased upwards of $120,000, or in any sum of money at all, or all equality or uniformity of assessment upon the various lots and subdivisions assessed was destroyed, or that this was knowingly and intentionally done, or at all done by said Commission, and upon and according to his information and belief, the defendant avers the truth and fact to be of and concerning said alleged changes and modifications, that after the filing of said report by said Commissioners in said County Court, the objectors in said complaint named, did file their written objections to the confirmation of said report; that thereupon the property owners affected in and by the widening of said Dupont street, including the plaintiffs in this case and their predecessors in interest, by themselves and their counsel, conferred and consulted with said objectors, their respective counsel, and examined and investigated into the grounds of said alleged objections, and after fully and carefully examining and considering said report and the objections thereto, and the widening of said Dupont street, by consent of all parties concerned, and for the purpose of avoiding greater expense, litigation, delay, loss and detriment, to all parties concerned, did knowingly, understandingly and mutually consent and agree to said alleged changes and modifications, and did thereupon present, or cause to be presented to said Dupont Street Commissioners and to said County Court, their petition in the words and figures following:

202 " SAN FRANCISCO, December 14th, 1876.

To the Board of Dupont Street Commissioners—

GENTLEMEN:

As property owners, assessed to pay for the proposed widening of Dupont street, from Market to Bush streets, we respectfully, but earnestly, urge upon you the necessity of completing the widening immediately. It has come to our knowledge that obstacles have been interposed to the confirmation of your report to the County Judge by certain property-owners, who require changes in the assessment for damages and benefits. In
203 all of these we deem it best that concessions be made in every case, rather than the widening should be jeopardized, and to that end all concessions, and to any extent that you may make, will, in view of the urgency of the improvements, meet with our hearty approval and support."

Which petition, as this defendant is informed, and verily believes, was presented to said Dupont Street Commissioners, and to said County Court, as aforesaid, by, and on behalf of all of the property-owners concerned, or affected, by the widening of said Dupont Street, including the plaintiffs herein, and their predecessors in
204 interest.

And defendant, answering unto paragraph 13th of said complaint, denies that while said Thomas H. Blythe was claiming, or about to claim in said County Court, that said Board, in estimating the value of property taken had adopted the wrong rule in estimating the value thereof as alleged in said paragraphs 7 and 8 of said complaint, or at any time said Board of Commissioners, or any of them, to induce said Blythe to withdraw his objections, or any of his objections, entered into an arbitration with said Blythe, or entered into an agreement by and between them and said Blythe, whereby D. C. McRuer, Thos. D. Matthewson and

205 Eugene McCarthy were appointed arbitrators, or that it was submitted to them as arbitrators, to determine what amount of the fair and legitimate cost of widening the street should be assessed upon the property of said Blythe, or that it was agreed by said Board, in the matter of said arbitration, that said arbitrators in making their determination, should consider the whole subject of allowance for damages to land, and the apportionment of benefits to the same as though nothing had been done in the premises by any one thereof, or that said arbitrators should take, as a basis for allowing damages, the difference in value between the lots on the west side of said Dupont
206 street as they were before the widening, and the value of the same lots diminished in depth thirty feet.

Defendant denies that said McRuer, Matthewson and McCarthy, as arbitrators, proceeded to make estimates, or found, or ascertained, or reported to said Board of Commissioners, that the value of the whole land taken for said widening of Dupont street, was only $246,240, instead of $639,913; and defendant denies that said McRuer, Matthewson and McCarthy, as arbitrators, found, or ascertained, or reported to said Board of Commissioners, that said Blythe's property would be benefited, or should
207 pay only the sum of $39,653, instead of $97,308, as found by said Board of Commissioners.

Defendant avers that said McRuer, Matthewson and McCarthy did not act as arbitrators, as alleged in the thirteenth paragraph of said complaint, and that the whole action of said McRuer, Matthewson and McCarthy, in and about the premises, was simply advisory to the said Board of Commissioners, and in no way binding upon them, and was not made by said McRuer, Matthewson and McCarthy, as arbitrators, or in any other capacity than as advisors to the said Board of Commissioners.

Defendant denies that the parties affected by said assessment, other than said Blythe, had no notice of the

matters in the said thirteenth paragraph of the complaint alleged, or no opportunity to contest the same, or to be heard thereon.

Defendant denies that the matters alleged in the thirteenth paragraph of said complaint, or the whole thereof, or any part thereof, was concealed by said Board of Commissioners, or by any of them, from the plaintiffs, or from any of the plaintiffs, or from the persons whose property was or is affected by said assessment, or from any of such persons.

Defendant denies that said Board of Commissioners, for the purpose of inducing said Blythe to withdraw his exceptions, as stated in the twelfth paragraph of the complaint, consented to change or diminish the amount of the estimated benefits on the property of the said Blythe from $97,308 to $39,653, or consented to make any change in the amount of the estimated benefits on the property of said Blythe, for the mere purpose of inducing said Blythe to withdraw his exceptions to the report of said Commissioners; on the contrary, defendant avers that the whole action of the said Board of Commissioners in the matter of the assessment of said Blythe, was in good faith and for the purpose of correctly assessing the property of said Blythe, to be benefited by said widening of Dupont street.

Defendant, in answer to the fourteenth paragraph of the complaint, denies that said Board of Commissioners never did, in fact, and denies that no member of said Board ever did ascertain, or determine, the value of the several lots, or subdivisions of land, or any of them, or buildings, or any of them, included in the land taken for the widening of said Dupont street, or the damage done to the property along the line of said Dupont street, or any of it, or the amount which said lots assessed, or any of them, would be benefited by reason of the widening of said Dupont street.

211 Defendant denies that said Board of Commissioners did not, themselves, personally, examine into said matters, or employed certain persons, whom they called, or designated, experts, to ascertain, or determine all, or singular, said matters, for them; and denies that said Board of Commissioners adopted the estimates of said experts, as to all, or any of said matters, or embodied them in their said report, without ever, in fact, having made any estimate of their own thereupon.

On the contrary, defendant avers that all the matters embraced in and set forth in the report of said Board of Commissioners, as to the widening of said Dupont street,
212 were matters which were ascertained, determined and personally examined and estimated by said Board of Commissioners themselves; and that the said report of the said Board of Commissioners, as to the widening of said Dupont street, was the result of personal estimate and decision and judgment of said Board of Commissioners, and of no other person or persons whomsoever.

And as to the matters set forth in the 15th paragraph of said complaint, the defendant denies, according to his information and belief, that at the dates or times in the complaint mentioned, or at any of them, A. J. Bryant
213 was the owner of or interested in any lands on the west side of Dupont street, or in any lands which were taken for the widening of said Dupont street, or that said A. J. Bryant was interested in any of the lands on the west side of Dupont street, which were taken for the widening thereof, and the title of which stood of record in the names of persons, or of any persons, other than the said Bryant.

Defendant denies that said A. J. Bryant was interested in the lot on the northwest corner of Dupont and O'Farrell streets, or in any portion of said lot.

Defendant denies, according to his information and belief, that Richard Ivers ever acted as the agent of said A.

214 J. Bryant in purchasing from one John Griffin any property on the west side of Dupont street, or the lot on the northwest corner of Dupont and O'Farrell streets; and denies that said Bryant was jointly, or at all, interested with said Richard Ivers in the purchase of said lot at the northwest corner of Dupont and O'Farrell streets, or in the purchase of any lot on the west side of Dupont street, or in the purchase of any lot which was taken for, or affected by the widening of said Dupont street.

Defendant denies, according to his information and belief, that said A. J. Bryant was interested in any lot on Dupont street, the title of which was taken, or stood in
215 the name of Robert Watt and Francis Berton, or in the name of either of them.

Defendant denies, according to his information and belief, that Robert Watt and Francis Berton advanced any money to A. J. Bryant, or to A. J. Bryant and Richard Ivers jointly, for the purchase of any property situated on the west side of Dupont street, or on the northwest corner of Dupont and O'Farrell streets.

Defendant avers, according to his information and belief, that in the month of September, 1876, said Richard Ivers purchased from John Griffin, for the sum of $75,-
216 000, the lot situated at the northwest corner of Dupont and O'Farrell streets, which last mentioned lot had a frontage of 36 feet and 6 inches on Dupont street by a depth of 80 feet on O'Farrell street, but the fact of said purchase of said Richard Ivers was public and notorious. That said Richard Ivers, at the time of said purchase, offered to A. J. Bryant a joint interest in the same, which the said A. J. Bryant then and there declined, but agreed to endorse the promissory notes of said Richard Ivers for $60,000, payable in three and twelve months, upon condition that the Swiss American Bank would advance the face of said notes to said Ivers, and take as security for payment of said notes the fee simple title of said lot on

the northwest corner of Dupont and O'Farrell streets in its own name, and the further security of $35,000 collaterals belonging to said Richard Ivers then in possession of said Swiss American Bank; that thereafter said Swiss American Bank demanded, as additional precaution, that the said A. J. Bryant should become a joint maker of said notes for $35,000 instead of being merely the endorser thereon, and that thereupon, the said A. J. Bryant, as an accommodation to said Richard Ivers, and not otherwise, and knowing that the security to said bank was abundant for the said loan, and that he, the said Bryant, incurred no risks in becoming a joint maker of said notes, did sign said notes, as the joint maker thereof, with the said Ivers; that thereafter, on the 2d day of August, 1877, said Richard Ivers made a mortgage upon said lot, at the northwest corner of Dupont and O'Farrell streets, to the Odd Fellows' Bank, to secure to the last mentioned Bank the sum of $35,000 then and there loaned by said Odd Fellows' Bank to said Richard Ivers, and with that money, and the proceeds of the collaterals aforesaid, then previously held by the Swiss-American Bank, and from resources of his own, the said Ivers took up the joint notes of himself and the said Bryant to the said Swiss American Bank, and cancelled the same, and that the whole action of said A. J. Bryant in the matter of assisting said Richard Ivers to raise money for the purpose of carrying out and effectuating his purchase from said John Griffin, was merely as a friendly act to said Ivers, and not because of any interest, actual or contingent, of said Bryant in said purchase.

The defendant denies that said A. J. Bryant was not a disinterested Commissioner in the matter of said improvement, to-wit: the widening of Dupont street, and denies that he acted in any or all of said matters as a judge in his own cause.

220 Defendant denies, according to his information and belief, that the said A. J. Bryant was interested in any pieces of property affected by said assessment for the widening of Dupont street, the title to which was ever concealed, or held in the name of any person, or persons, unknown to the plaintiffs, or in the name or names of any third persons.

Defendant admits, according to his information and belief, that for seven or eight years last preceding the passage of the Statute of California under which said Dupont street was widened, said A. J. Bryant was the owner, jointly with one G. L. Bradley, one of the plain-
221 tiffs in this action, of that certain lot situate on the northeast corner of Morton and Dupont streets, having a frontage of 20 feet on Dupont street by 60 feet on Morton street.

That the assessment of the Board of Commissioners for the widening of Dupont street upon last mentioned lot, was according to the general scale of assessment adopted for the property along the east line of Dupont street, and that the assessment for the last mentioned lot was perfectly fair and just, and the said Bryant's ownership with the said Bradley of the lot last mentioned, was
222 a notorious fact, and appeared upon all the maps and reports made, or caused to be made, by said Board of Commissioners, in the widening of said Dupont street, and was also published in the daily papers in their account of the assessments and proceedings of said Board of Commissioners.

Defendant denies, according to his information and belief, that the portion of the aforesaid lot at the northwest corner of Dupont and O'Farrell streets, after cutting therefrom thirty feet for the widening of said Dupont street, was worth sixty thousand dollars, or any sum greater than fifty-five thousand dollars, but that this value of fifty-thousand dollars is incumbered by the lien

223 and charge upon said lot for the widening of Dupont street, which lien and charge amounts, in the aggregate, to the sum of nineteen thousand five hundred dollars.

Defendant, in answer to the matters set forth in the 16th Subdivision of said complaint, denies that said Board of Dupont Street Commissioners never acquired jurisdiction to widen said Dupont street, or any portion thereof.

Defendant denies that the notices mentioned in said complaint and called for by the Statute for the widening of said Dupont street were not given, as alleged, in said
224 complaint, but, on the contrary, defendant avers that said notices, and every of them, were duly and properly given.

Defendant avers that, by the report of said Board of Dupont Street Commissioners, as confirmed, the total costs of said improvements for the widening of Dupont street, with the expense of the same, was fixed and assessed by their report at nine hundred and fourteen thousand nine hundred and forty-one dollars.

But that to provide for the interest, which became payable on the first day of July, 1877, upon the bonds authorized to be issued under the aforesaid Statute, and in view of the fact that said bonds were not saleable at a
225 higher price than 95 per cent. on their par value, it became necessary, in order to effectuate and carry out the intention of said Statute, and to provide for the payment of the interest accrued on the first day of July, 1877, on the aforesaid bonds, to issue bonds to the amount of one million of dollars, in order that the sum of $950,000 might be actually realized by and from said assessment, and for these reasons the amount of bonds issued by the Commissioners authorized to issue said bonds was fixed at one million of dollars, and in further explanation of the matters alleged in the 18th subdivision of said complaint, defendant further avers, that on the 20th day of

226 December, 1876, the final report of said Board of Dupont Street Commissioners was fully confirmed by the final judgment of the County Court of the City and County of San Francisco.

That said County Court, by its said final judgment of December 20, 1876, adjudicates, among other things, as follows:

1st. That on the first day of May, 1876, the Board of Supervisors of the City and County of San Francisco duly passed an order, which was duly approved on the 3d day of May, 1876, by A. J. Bryant, as Mayor and *ex-officio* President of said Board of Supervisors, wherein
227 and whereby said Board of Supervisors declared it to be expedient that Dupont street, in said City and County of San Francisco, be widened, under and in accordance with, and to the extent and under the conditions prescribed in that certain Statute of the State of California, entitled "An Act to authorize the widening of Dupont street, in the City of San Francisco, approved March 23d, 1876."

2d. That the said Board of Dupont street Commissioners had duly caused to be published the notice required, and for the period required, by the sixth section of last mentioned Statute of March 23d,
228 1876.

3d. That the said Board of Dupont street Commissioners had completed its report on the 23d day of September, 1876, and that as soon as the same was completed, had left it at the office of said Board, daily, during ordinary business hours, for thirty days, to-wit: from the 23d day of September, 1876, up to and including the 27th day of October, 1876, for the free inspection of all parties interested, and that notice that said report was so open for inspection for such time and at such place was duly published by said Beard, daily, for twenty days, in two daily newspapers printed and published in said City and County of San Francisco, to-wit: from the 23d day of

September, 1876, to the 17th day of October, 1876, both inclusive, as required by said Statute of March 23d, 1876.

4th. That the gross amount of damages for the widening of Dupont street, between Bush and Market streets, was $914,991.80, and that the amount allowed by said Board for attorney's fees, salary of Secretary, expenses of experts, and all other amounts as appeared in said report, including such contingent expenses as might be necessarily incurred in closing the labors of said Board, was fair, reasonable and just.

5th. That the gross amounts of benefits assessed against the property described in the report of benefits of said Board was $796,837.

6th. That all the proceedings taken by said Board had been duly and legally taken, and that all the acts, matters and things provided by said Statute of March 23d, 1876, to be done and performed by said Board in the premises, had, on the part of the said Board, been duly and regularly done and performed in the forms, at the times, and in the manner prescribed by said Statute of March 23d, 1876.

7th. That the report of said Dupont Street Commissioners, in the matter of the widening of Dupont street, filed in said County Court, on the 27th day of October, 1876, as modified by said Board, under orders of said County Court theretofore made, and, as the same then existed on file in said County Court, should be fully, and in all respects, approved and confirmed.

Defendant further avers, that after the aforesaid final judgment of said County Court, and during the first seven months of the year 1877, the said Dupont street, between Market and Bush streets, was actually widened from an original width of forty-four feet to a width of seventy-four feet, measuring westerly from the original and present easterly line of said Dupont street, and that the space so added to said Dupont street,

232 was taken from the land along the westerly side thereof; that in obedience to the final report of said Board of Dupont Street Commissioners, and to said final judgment of said County Court, all the owners of lots and buildings along the original westerly line of said Dupont street, and between Market and Bush streets, acquiesced in said widening of Dupont street, and during the first seven months of the year 1877, removed all their respective buildings andimprovementsfrom the said additional belt, thirty feet in width, so added to Dupont street on the westerly side thereof, and absolutely surrendered said additional belt of ground to the uses and pur-
233 poses of a public street, and as an addition to said Dupont street, and all this as early as the 31st day of July, 1877.

Defendant further avers that since the surrender last mentioned, and since the month of July, 1877, the said addition to Dupont street has constituted a part thereof, and has been devoted to the uses and purposes of a public street, and has been used and is still used as such, by the plaintiffs herein, and by the public at large; and that ever since the month of July, 1877, the plaintiffs have had and enjoyed, and do still have and enjoy all
234 the benefit and advantage which has accrued and does accrue to their respective lots described in the complaint herein, from the aforesaid widening of Dupont street.

Defendant further avers that since the said final judgment of said County Court, and previous to the 1st day of November, 1877, there have been constructed along the new westerly line of Dupont street, between Bush and Market streets, (that is along the new westerly line, established for Dupont street by said widening), at a cost of about eight hundred thousand dollars, twenty new brick buildings, one of which is five stories in height, twelve of which are four stories in height, six of which are three stories in height, and one of which is two stories in

height. That said twenty new brick buildings contain, on their first or ground floor, thirty-nine rooms suitable for, and intended for, and most of which are now occupied as stores or shops.

Defendant further avers, that since said final judgment of said County Court, and upon the faith thereof, the said Board of Dupont Street Commissioners have caused to be prepared and issued, in accordance with the provisions of the aforesaid Statute of March 23d, 1876, and for the purpose of thereby paying and discharging all the damages, costs and expenses of the said widening of Dupont street, one thousand bonds of the City and County of San Francisco, each of which bonds bears date the first day of January, 1876, (which is the date on which each of said bonds was issued), and is for the sum of one thousand dollars, and is payable in gold coin of the United States, twenty years from the date thereof, and bears interest in like gold coin, at the rate of seven per cent. per annum, payable half yearly, on the first day of July and the first day of January of each year, upon interest coupons attached to each of said bonds, and the principal and interest of each of said bonds is payable at the office of the Treasurer of the City and County of San Francisco, and each of said bonds is executed under the official seal of the City and County of San Francisco, and is subscribed by the Mayor, the Auditor and the City and County Surveyor of said City and County of San Francisco, constituting the Board of Dupont Street Commissioners.

Defendant further avers, that during the first six months of the year 1877, the Mayor, Auditor and Treasurer of the City and County of San Francisco, did sell and dispose of said one thousand bonds, in accordance with the requirements and provisions, and for the purposes expressed in said Statute of March 23d, 1876, and

238 all this before any question was raised by plaintiffs, or by any of them, or by any one else, as to the validity of the proceedings, under the last mentioned statute, for the said widening of Dupont street, or as to the validity of said widening of Dupont street, or as to the validity of said bonds, or as to the validity of the assessment to pay the interest, and one-twentieth of the principal of said bonds.

Defendant further avers, that the greater part of said one thousand bonds, have, according to his information and belief, been purchased and paid for, and are now held by innocent holders who purchased and paid for the 239 said bonds in the Fall of 1877, and during January and February, 1878, and who, at the time they so purchased and paid for said bonds, had no knowledge or notice, either actual or constructive, either express or implied, of any defect, or vice, or impurity, or fraud in said bonds, or in any of them, or in any of the acts, doings or proceedings which led to the issuance of said bonds; on the contrary, defendant avers, according to his information and belief, that last mentioned holders and purchasers of said bonds, purchased and paid for the same, and every of them, in good faith, and in the full belief that all the pre-requisites to the issuance of said bonds, and to the 240 issuance of every of them, had been fully complied with, and that said bonds were good and valid and negotiable bonds.

Defendant further avers, that each and every of said one thousand bonds is payable on its face to the holder thereof, and is a negotiable bond, and is transferable by mere delivery from one holder thereof to another.

And as to paragraph 19th of said complaint, defendant denies that said proceedings constitute an apparent lien upon all said real estate of plaintiffs; but aver that the same are, in fact, a real lien upon said lands, and deny that said proceedings, or any of the same, constitute or

241 work a cloud upon the title of plaintiffs, or the title of any of them, to their respective lots, or work an irreparable injury thereto, or to any of the same.

And answering unto paragraph 20th of said complaint, defendant denies, upon and according to his information and belief, that said plaintiffs, and every of them, had not knowledge of the facts alleged in paragraphs 7, 8, 9, 10, 11, 12, 13, 14 and 15 of said complaint, and denies that the same were discovered or known to plaintiffs, or to any of them, prior to April 5th, 1878; but avers, on the contrary, that the same and every of the matters and things in said paragraphs, respectively set forth, were known to
242 plaintiffs at the time the same occurred; and defendant denies, that said plaintiffs, and every of them, have not acquiesced in said assessment, and denies that they have never consented thereto. And avers, on the contrary, that they, and every of them, have consented thereto, and to all and singular the matters and proceedings in and about the widening of said Dupont street.

And defendant, answering unto paragraph 22nd of said complaint, denies that the purchase or sale of any of said lands by this defendant will constitute a cloud, or any cloud, upon the title of plaintiffs, or any of them, to the lands of any of them, of such a character that none of
243 them will be able to sell their lands, or the lands of any of them, without removing such cloud, or that no searcher or examiner of titles, or lawyer, would or will approve the title to said lands, after the same had been covered by a sale thereof, or that no person could be found who would buy said lands without the removal of said cloud; denies that said assessment is so onerous and excessive, or so onerous or excessive, that it amounts practically, or at all, to confiscation of the property of these plaintiffs, or any of them; denies that the income of the plaintiffs, or any of them, from their property affected by said assessment, is now insufficient to pay the

244 ordinary taxes levied upon said property, or any of the same, and this assessment; and deny that said assessment, if maintained, would take the whole income of the respective properties of said plaintiffs, or any of them, for twenty years, to pay said assessment and taxes, or that their property, or the property of any of them, will be practically, or at all confiscated thereby.

And for a further, separate and distinct answer, defendant avers that on or about March 26th, 1878, Leo Maurer and others, including said plaintiffs and their predecessors, did, in the District Court of the Nineteenth Judicial District of the State of California, in and for the
245 City and County of San Francisco, institute a suit against this defendant in his capacity of Tax Collector, for the purpose of enjoining, and restraining this defendant from selling premises in said complaint described for the delinquent assessment due upon said assessment. And in said complaint did set forth all and singular the matters in the complaint herein alleged, save and except such matters as are in paragraphs 13, 15 and a portion of paragraph 22, set forth, but in substance and in the main, the matters alleged in the complaint herein, in the respective portions of the paragraphs, and portions of paragraphs herein last mentioned, did set forth and allege, in said
246 complaint the matters therein alleged, to-wit: in the said last mentioned paragraph, and portions of paragraphs alleged; and thereupon process was issued in said action and served upon this defendant, who made answer thereto; that in said action said plaintiffs did obtain a writ of injunction enjoining and restraining said defendant from the sale of said lands and premises until the further order of said Court last named; that thereafter this defendant did, in due form of law, apply to said District Court for the dissolution of said injunction and restraining order, and thereupon all and singular the matters and things in said

247 complaint alleged were put in issue and heard and determined before said District Court of the Nineteenth Judicial District, and after argument thereon the same was submitted to the Court for decision, and thereafter, to-wit: on the 22d day of June, 1878, said District Court did decide, adjudge and declare that, all and singular, the acts and proceedings of the Board of Supervisors of the said City and County of San Francisco, and of said Board of Dupont Street Commissioners were legal and valid, and that the defendant had lawful power and authority to proceed to sell the lands and premises therein mentioned for the non-payment of the delinquent assess-
248 ment due upon said Dupont street assessment, and to dissolve and discharge said restraining order, which order and judgment of said District Court still remains in full force and effect, unreversed and not in any manner vacated or set aside, and this defendant hereby pleads the proceedings in said District Court of the said Nineteenth Judicial District, not only by way of estoppel, but in abatement of any further proceedings in this action.

Wherefore defendant prays, the premises considered, that plaintiffs take nothing by their action; that he be dismissed hence with judgment for costs.

249 W. C. BURNETT,
McALLISTER & BERGIN,
Attys. for Defendant.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss.*

William Mitchell, having been duly sworn, says: that he is the defendant in the above entitled action; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on infor-

250 mation and belief, and as to those matters that he believes it to be true.

WM. MITCHELL.

Subscribed and sworn to before me, this 11th day of April, A. D. 1879.

[SEAL.] J. H. BLOOD,
Notary Public.

[Endorsed:]

Service of a copy of the within answer admitted this 11th day of April, A. D. 1879.

BISHOP & FIFIELD,
GARBER & THORNTON,
251 *Attys. for Pl'tffs.*

Filed April 11th, 1879.

THOS. H. REYNOLDS,
Clerk.
By J. D. RUGGLES,
Dep. Clerk

[Title of Court and Cause.]

Answer to Complaint in Intervention.

Now come the plaintiffs by Garber, Thornton and
252 Bishop, their attorneys, and answer to the complaint in Intervention of D. O. Mills and of the University of California, and of Jacob Rosenberg, Charles Lux and Joseph Rosenberg, Executors of the last will of Michael Reese, deceased, and of William A. Piper, and of Charles F. MacDermot, and for answer to the first subdivision of said complaint in Intervention say:

That they have not, nor has either of them, any information or belief upon the subject sufficient to enable them, or either of them, to answer, and they therefore deny that either of said intervenors is the owner or holder of certain or any bonds known or designated as the "Du-

pont Street Bonds," and they deny that said Dupont Street Bonds, or any thereof, were issued under or in accordance with the provisions, or any of the provisions of that certain Statute of the State of California, entitled "An Act to authorize the widening of Dupont Street in the City of San Francisco," approved March 23d, 1876, or under or in accordance with the provisions of any Statute or by any lawful authority whatever, and they deny that said bonds, or any thereof, are executed under the official seal of the City and County of San Francisco, or that the same or any thereof are subscribed by the Mayor, the Auditor, or the City and County Surveyor of said City and County of San Francisco, or either or any of them, or that said Mayor, Auditor and City and County Surveyor, or either or any of them constitute, or ever constituted the Board of Dupont Street Commissioners, or that said bonds or any thereof, were or are negotiable or transferred by mere delivery from one holder thereof to another, or that said intervenors or any of them at the time they or any of them purchased or paid for that, or any number of the said Dupont Street Bonds, which they or either of them now holds or owns, or ever held or owned as alleged in said complaint in intervention or otherwise had no knowledge or notice either actual or constructive, express or implied, or no suspicion of any of the omissions or defects, non-advertisements or defective advertisements, non-action or defective action by the Board of Supervisors of the City and County of San Francisco, or by the Board of Dupont Street Commissioners, or collusive agreements or frauds or wilful or improper conduct on the part of the Board of Dupont Street Commissioners, charged in the complaint herein, or that at the time in that behalf alleged in said complaint of intervention, said intervenors or any or either of them, had no knowledge or notice, either actual or constructive, or express or implied, or

256 otherwise, and that they had no suspicion of any defect, or vice, or infirmity, or fraud in said Dupont Street Bonds, or in any of them, or in any of the acts, doings or proceedings which led to the issuance of said bonds, or of any thereof, and they deny that said intervenors, or any or either of them, purchased or paid for that, or any number of said bonds which they, or either of them, now holds or owns, or at any time held or owned, as alleged or otherwise, or for any of said bonds at the time or place in that behalf alleged in said complaint in intervention, or at any time in good faith, or before any question had arisen, or any action had been
257 brought concerning the validity of said bonds, or of any of them, or relying upon the alleged final judgment, or any judgment of the County Court of the City and County of San Francisco, rendered on the 20th December, 1876, or at any other time, in the matter of the widening of Dupont street, or in the full belief, or in the belief that all the pre-requisites to the issuance of said bonds, or to the issuance of any thereof, had been fully or at all complied with, or that said bonds or any thereof were good or valid or negotiable bonds.

And these plaintiffs further deny that the said intervenors, or any of them have, or either of them has, an
258 interest in the matter in litigation in this action, or in the success of the defendant herein, or that they or any of them are, or either of them is, or that they and the other holders of said Dupont street bonds are, the real parties interested in the defense of this action, or that said defendant, Tillson, is a mere nominal defendant, or only interested to perform his duty as Tax Collector, in collecting the tax levied as in said complaint in intervention is alleged; on the contrary, they aver that said defendant, Tillson, is the real and proper and only necessary party defendant to this suit.

And these plaintiffs aver, on information and belief,

259 that the said intervenors, and each and every of them at the time of the alleged purchase of and payment for said Dupont street bonds by them respectively, had full knowledge and notice of all the alleged omissions, defects, non-advertisements and defective advertisements, non-action and defective action, by the said Board of Supervisors, and by said Board of Dupont Street Commissioners, and of the collusion, agreements, frauds and wilful and improper conduct on the part of the Board of Dupont Street Commissioners, and of the adoption of a false rule of valuation by said Board of Dupont Street Commissioners, as in the complaint herein and hereinafter charged and alleged, and of all the defects, vices, infirmities and frauds in said bonds, and in the acts, doings and proceedings which led to the issuance thereof, which are hereinafter and in said complaint of the plaintiffs set forth.

260

And plaintiffs further aver on information and belief, that said intervenors did not, nor did any or either of them, purchase or pay for any of said bonds in good faith, or before any question had arisen or any action had been brought concerning the validity of said bonds, or of any of them, or relying upon the final or any judgment of the said County Court of the City and County of San Francisco, or in the belief that all or any of the pre-requisites to the issuance of said bonds had been fully or at all complied with, or that said bonds or any thereof were good or valid or negotiable bonds.

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And answering unto the 2d, 3d, 4th, 6th and 7th subdivisions of said complaint in intervention, these plaintiffs further aver that they have not, nor has either of them, any knowledge or information sufficient to enable them or either of them to form a belief, and they therefore deny:

That on the 6th day of February, 1878, at said San Francisco, or at any time or at any place, the said Inter-

262 venor, D. O. Mills, purchased five or any of said Dupont Street Bonds, or that he then and there, as in said complaint in intervention alleged, or at all, or at any time or place, paid therefor, or for any thereof, the sum of four thousand four hundred and fifty dollars, or any sum, or that he is now or ever since said 6th day of February, 1878, has been or ever was the owner or holder of said five or any Dupont Street Bonds whatever, or of any interest coupon or coupons attached thereto.

That on the 14th day of January, 1878, at said San Francisco, or at any time, or at any place, the said intervenor, the University of California, purchased forty or
263 any of said Dupont Street Bonds, or that it then or there, as in said complaint in intervention alleged, or at any time or place, or at all, paid therefor, or for any thereof, the sum of thirty-six thousand dollars ($36,000) or any sum, or that it is now or ever since said 14th day of January, 1878, has been or ever was the owner or holder of said forty or any Dupont Street Bonds whatever, or of any interest coupon or coupons attached thereto.

That between the 5th day of November, 1877, and the 6th day of March, 1878, at said San Francisco, or at any time, or at any place, the said Michael Reese, now deceased, purchased thirty or any of said Dupont Street
264 Bonds, or that he then or there, as alleged in said complaint in intervention, or at any other time or place, or at all, paid therefor the sum of twenty-six thousand dollars ($26,000) or any sum, or that from the said 6th day of March, 1878, until his death, or at any other time, he was the owner or holder of said thirty or any bonds, or of any interest coupon or coupons attached thereto, or that since the death of said Reese, said thirty or any of said bonds have constituted or do still constitute part of the assets of his estate, or are now or ever were held by the said intervenors, Jacob Rosenberg, Charles Lux and

265 Joseph Rosenberg, as executors of the last will of said Reese, deceased.

That on the 14th day of September, 1877, at said San Francisco, or at any time or place, the said intervenor, William A. Piper, purchased fifty, or any of said Dupont Street Bonds, or that he then or there, as in said complaint in intervention alleged, or at any other time or place, or at all, paid therefor the said sum of forty-seven thousand two hundred dollars ($47,200) or any sum, or that said Piper is now, or ever since said 14th day of September, 1877, has been or ever was the owner or holder of said fifty or any Dupont Street Bonds whatever,
266 or of any interest coupon or coupons attached thereto.

That in the month of March, 1887, at said San Francisco, or at any time or place, the said intervenor, Charles F. MacDermot purchased twenty or any of said Dupont Street Bonds, or that he then or there as alleged in said complaint in intervention, or at any other time or place, or at all, paid therefor the said sum of eighteen thousand nine hundred dollars ($18,900) or any sum, or that said MacDermot is now or ever since said month of March, 1877, has been the owner or holder of said twenty or any Dupont Street Bonds whatever, or of any interest
267 coupon or coupons, attached thereto.

And plaintiffs aver that eighteen of the twenty of said Dupont Street Bonds, so alleged to have been purchased by said intervenor MacDermot, to-wit: numbers 954, 955, 957, 959, 962, 966, 968, 971, 973, 975, 976, 977, 978, 980, 992, 993, 994, 995, with all the interest coupons attached thereto, were part of a large number of such bonds which were falsely and fraudulently over issued, and in excess of any amount which said Act of the Legislature permitted or authorized to be issued, and that at the time of his said purchase, said MacDermot had full notice and knowledge thereof.

And answering unto the 8th subdivision of said com-

268 plaint of intervention, these plaintiffs deny that said Board of Supervisors within 60 days next after the passage of said Act of the Legislature, or at any time, did by resolution or order or otherwise, express its judgment, or any judgment, that it would be, or was expedient that Dupont street be widened in accordance with or in the mode prescribed by said Act, or at all, and they deny that said Board of Dupont Street Commissioners became or was a legal Board, or was authorized to act under or by virtue of said Act or of any of the provisions thereof.

And answering unto the 9th subdivision of said complaint in intervention, they deny that said Board of
269 Commissioners proceeded to act, or did act under or in pursuance of the provisions or of any provisions of said Act of the Legislature, or were lawfully or otherwise authorized thereunto by the provisions or by any provision of said Act, or that they did act in conformity therewith, or that said Board of Dupont Street Commissioners did at the time or in the manner prescribed in and by the provision or any of the provisions of said Act of the Legislature, or at any time or in any manner publish the notice, or any notice to property owners required by the provisions of Section 6 of said Act, or in strict con-
270 formity or in any conformity therewith.

And answering to the 10th subdivision of said complaint in intervention, these plaintiffs deny that said Board of Dupont Street Commissioners did, in compliance with the provisions or with any provision, of said Act, or at the time or in the manner therein or thereby provided, or at any time or in any manner, prepare or adopt any plans, maps or diagrams as provided in Section 7 of said Act, or at all, or did proceed in form and in fact, or in fact, to ascertain, determine or separately state or set down in a written report, or any report signed by them or otherwise, the description or actual cash value of the several lots and subdivisions of land and buildings, or of

271 any thereof, included in the lands taken in the widening of said Dupont street, between the northerly line of Market street and the southerly line of Bush street, or the damages done to the property or any of the property along the line of said street, in form and in fact, or in fact, as provided in said Act of the Legislature, or did proceed in form and in fact, or in fact, or did in form and in fact, or in fact ascertain or set down in their report, or in any report, any description of the several or any of the subdivisions or lots of land included in the District designated in the proviso contained in Section 3 of said Act, with the sum or amount which said Board actually or
272 otherwise estimated each lot had been or would be benefited by reason of the widening of said street, or that said Board of Commissioners completed their said report or any report in form and in fact, or in fact, as required in and by said Act of the Legislature, or that said report of said Board was actual, real and in fact, and not simply in form, simulated and unreal, or that the same was wholly and really, or at all, made in conformity with the provision or any of the provisions of said Act of the Legislature, or at the time or in the manner prescribed thereby.

273 And answering unto the 11th Subdivision of said complaint in intervention, these plaintiffs deny:

That said Commissioners did truly or justly ascertain or determine according to their best judgment, or at all, the actual cash value of the land, or any of the land taken as alleged, or did estimate or set the same down in the said report, or in any report, or did not estimate value of any land so taken at 200 per cent., or at any per cent., or at all, greater than was the value of the same in fact.

And answering to the 12th Subdivision of said complaint in intervention, these plaintiffs deny:

That the said Board of Commissioners did justly or

274 truly, or according to their best judgment, information or belief, or honestly, or in good faith, or at all, adopt a true or correct rule, or any rule for the ascertainment of the benefit derived, or to be derived by said, or any of said parcels of land, respectively, from said widening of said Dupont street, or did ascertain or set down against each or any lot the amount of benefit by each respectively derived therefrom, or that they did not omit to set down against each and all of the lots, the amount of benefit derived from said widening of said Dupont street.

And answering unto the 13th Subdivision of said complaint in intervention, these plaintiffs deny:

275 That said Commissioners, or any of them, did actually ascertain or determine, according to their best judgment, or in good faith, or at all, the amount of benefits derived to each or any of said parcels of land mentioned in said subdivision from the widening of said Dupont street, or that they did set the same or any thereof down in their said report, or in any report, or that in the ascertainment thereof, they or any of them in good faith endeavored to act, or did act according to a uniform or equal method of ascertaining the amount of benefits derived by each or any of said parcels of land.

276 And answering unto the 15th Subdivision of said complaint in intervention, these plaintiffs deny:

That said Board of Dupont Street Commissioners did duly publish, or did publish at all, the notice, or all or any of the notices as provided or required in or by the provisions, or any of the provisions, of said Act of the Legislature.

And answering unto the 16th Subdivision of said complaint in intervention, these plaintiffs deny:

That the property owners, or any of the property owners interested or concerned in favor of, or in opposition to the objections mentioned in said 16th Subdivision, did fully, or at all investigate the same, or consult their

277 counsel with respect thereto, or that all and singular, or any of the matters in that behalf in said complaint alleged, were fully or at all examined or considered by the parties, or any of the parties in interest or their counsel, or by said County Court; and they deny, that the plaintiffs herein, or any or either of them, or their or any of their predecessors in interest, or the predecessors in interest or any or either of them, after the filing of said report by said Commissioners in said County Court, or at any time by themselves, or either or any of them, or their counsel, or the counsel of either or any of them, conferred or consulted with said objectors, or any or either
278 of them, or their respective counsel, or the counsel of any or either of said objectors, or with any counsel whatever, as alleged, or otherwise or examined, or investigated into the grounds, or any of the grounds of any of the said alleged objections, or after fully and carefully, or in any manner examining or considering said report or any of the objections thereto, or the widening of said Dupont street, by counsel of all or of any of the parties concerned, or for the purpose of avoiding greater or any expense, litigation, delay, loss or detriment to all or any of the parties concerned, or for any purpose whatever,
279 did knowingly, understandingly or mutually, or at all, consent or agree to said alleged changes or modifications, or to any thereof, or did thereupon present, or cause to be presented to said Dupont Street Commissioners, or to said County Court, the petition set forth in said complaint in intervention, or any petition whatever.

And they deny, that said alleged petition, or any petition, was presented to said Dupont Street Commissioners or to said County Court, by or on behalf of all or any of the property owners concerned or affected by the widening of said Dupont street, including the plaintiffs, or any or either of the

280 plaintiffs herein, or their or either of their predecessors in interest, or any of the predecessors in interest of either of them.

And answering unto the 17th Subdivision of said complaint in intervention, these plaintiffs deny:

That said McRuer, Matthewson and McCarthy did not act as arbitrators as alleged in the 13th Subdivision of the complaint of the plaintiff herein; and they deny, that the whole action, or any action of said McRuer, Matthewson and McCarthy, or any or either of them, in or about the premises as alleged in said complaint in intervention, was simply or in any manner advisory to
281 the said Board of Commissioners, or in no way, or was not in every way binding upon them, or was not made by said McRuer, Matthewson and McCarthy as arbitrators, or was not made by them in any other capacity than as advisors to the said Board of Commissioners.

And they deny that the whole action, or any action of the said Board of Commissioners in the matter of the assessment of said Blythe, was in good faith or for the purpose of correctly assessing the property of said Blythe.

And answering unto the 18th Subdivision of said complaint in intervention, these plaintiffs—

282 Deny that all or any of the matters embraced in, or set forth in the report of said Board of Commissioners as to the widening of said Dupont street, were matters which were ascertained, determined or personally examined or estimated by said Board of Dupont Street Commissioners themselves, or by any or either of said Board, and they deny that the said report, or any report of the said Board of Commissioners as to the widening of said Dupont street, was the result of personal estimate or decision or judgment of said Board of Commissioners, or any of them, and of no other person or persons whomsoever.

And answering unto the 19th Subdivision of said

283 complaint in intervention, these plaintiffs deny:—
That said Richard Ivers purchased from said John Griffin the lot mentioned and described in said 19th Subdivision of said complaint in intervention, for the said sum of $75,000, or for any sum exceeding $50,000, and they aver that said purchase of said lot by said Ivers was on behalf of himself and said Bryant jointly; and they deny that said Bryant declined a joint interest in said premises with said Ivers, or that said Ivers gave to said Swiss-American Bank the further security of $35,000 collateral, or any other sum as collateral, or that said Bryant did sign said notes, or any notes, as the
284 joint maker thereof with said Ivers, as an accommodation to said Ivers, or that said Bryant incurred no risks in becoming a joint maker of said notes, or that said Ivers from the proceeds of any collaterals of his own, or from resources of his own, or from both, took up the said joint notes, or any joint note of his own and said Bryant to the said Swiss-American Bank, or canceled the same or any thereof, or that the whole or any action of said Bryant in the matter of assisting said Ivers to raise money for the purpose of carrying out or effectuating his, said Ivers' said purchase from said John Griffin, or in or
285 about any of the matters alleged in the said 19th subdivision of the said complaint in intervention, was merely or at all a friendly act to said Ivers, or that it was not because of any interest, actual or contingent, of said Bryant in said purchase, but, on the contrary, these plaintiffs aver that the said Ivers acted as the agent of said Bryant and for himself in making said purchase, and made it for himself and said Bryant jointly, or for said Bryant alone, and that said Bryant ever since has been and still is largely interested in said property, and has expended large sums of money in the purchase thereof and in the erection of buildings thereon.

And these plaintiffs deny that the assessment of the

276 said Board of Commissioners for the widening of Dupont street, upon the lot of land situate on the northeast corner of Morton and Dupont streets was according to any general scale of assessment, adopted for the property along the east line of Dupont street, or that the assessment for said last mentioned lot was perfectly or at all fair or just.

And answering unto the 20th subdivision of said complaint in intervention these plaintiffs deny:

That the notices mentioned in the complaint of the plaintiff herein or any thereof were duly or properly given, and they deny that to provide for the interest which became payable on the 1st day of July, 1877, or
287 any interest upon the bonds authorized to be issued, or issued or pretended to be issued under the said Statute, or in view of the fact that said bonds or any thereof were not saleable at a higher price than 95 per cent. on their par value, or for or by reason of any matter or thing whatever, it became, or was necessary in order to effectuate or carry out the intention of said Statute, or to provide for the payment of the interest accrued on the 1st day of July, 1877, on the said bonds or any thereof, or any interest whatever, or for any other purpose, to issue bonds to the amount of one million dollars or any sum
288 to exceed $340,000, or that for the reasons in that behalf alleged in said complaint in intervention, or for any thereof, the amount of bonds issued as therein alleged was fixed at one million dollars.

And they deny that on the 20th day of December, 1876, or at any time, the final or any report of said Board of Dupont Street Commissioners was fully or at all confirmed by the final or any judgment of said County Court.

And they deny that the said Board of Dupont Street Commissioners caused to be prepared or issued in accordance with the provisions of the aforesaid Statute of March 23d, 1876, or for the purpose of thereby pay-

289 ing or discharging all the damages, costs or expenses of the said widening of Dupont street, one thousand bonds of the City and County of San Francisco, in the manner in that behalf alleged in said complaint in intervention, or that said Mayor, Auditor and Treasurer of said City and County did sell or dispose of said one thousand bonds or any thereof, in accordance with the requirements or provisions, or for the purposes expressed in said statute of March 23d, 1876, or that all or any of said bonds were so sold or disposed of before any question was raised by these plaintiffs, or by any of them, or by any one else, as to the validity of
290 the proceedings under the said statute for the said widening of Dupont street, or as to the validity of the said widening of Dupont street, or as to the validity of said bonds, or as to the validity of the assessment to pay the interest and one-twentieth of the principal of said bonds.

And these plaintiffs say that they have not, nor has either of them, any knowledge or information sufficient to enable them, or either of them, to form a belief, and they therefore deny:

That the greater part or any of said one thousand
291 bonds have been purchased or paid for, or are now held by innocent holders, or by holders who paid for the said bonds in the Fall of 1877, or during January or February, 1878, or who at the time they so purchased or paid for said bonds as alleged, had no knowledge or notice, either actual or constructive, express or implied, or otherwise, of any defect or vice or impurity or fraud in said bonds or in any of them, or in any of the acts, doings or proceedings which led to the issuance of said bonds, or that said or any of said alleged holders or purchasers of said bonds, or of any thereof, purchased or paid for the same, or any of them, in good faith or in the full belief, or in the belief that all or any of the pre-requisites to the

292 issuance of said bonds or to the issuance of any thereof, had been fully or at all complied with, or that said bonds were good or valid or negotiable bonds.

And answering unto the 21st Subdivision of said complaint in intervention, these plaintiffs deny:

That the proceedings referred to in said 21st Subdivision, or any thereof, are a real lien upon said lands or any thereof.

And answering unto the 22d Subdivision of said complaint in intervention, these plaintiffs deny:

That any of the matter or things in the said paragraphs 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the complaint
293 of the plaintiffs herein respectively set forth, were known to these plaintiffs, or to any of them, at the respective times the same occurred, and they deny that they, these plaintiffs, or any or either of them, ever consented to said assessment, or to any of the matters or proceedings in or about the widening of said Dupont street.

And further answering the said complaint in intervention, these plaintiffs aver:

That the Board of Supervisors, of the City and County of San Francisco, did not, by resolution or order, within sixty days after the passage of said act, or at any other time, express its judg-
294 ment, or any judgment, that it would be expedient that Dupont street be widened in accordance with or in the mode prescribed by said Act, or at all, and said Board of Supervisors failed within said period of sixty days after the passage of said Act, to pass any resolntion or adopt any order, declaring it expedient to widen Dupont street under the provisions of said Act, and by reason thereof the said Board of Dupont Street Commissioners, mentioned in said Act, never were constituted a legal Board, and never were authorized to act under the provisions of said Act.

That none of the property owners fronting on Dupont

295 street, between Bush and Filbert streets, ever did petition for the widening of said Dupont street, between said streets, nor was any petition by them or any of them ever filed with the Board of Commissioners aforesaid.

That under said Act the said Board of Dupont Street Commissioners, though wholly without authority, proceeded to act as such Board under the provisions of said Act. But said Board did not, at any time, publish, in two of the daily papers of said City and County of San Francisco, for a period of ten days, the notice to property-owners required by Section 6 of said Act, or any notice in that behalf.

296 That said Board, nevertheless, proceeded in pretended compliance with the provisions of said Act to prepare and adopt maps, plans and diagrams, as provided in Section 7 of said Act, and proceeded in form to ascertain, determine and separately state and set down in a written report, signed by them, the description and pretended cash value of the several lots and subdivisions of land and buildings included in the land taken for the widening of said Dupont street, between the northerly line of Market street and the southerly line of Bush street, and the pretended damages done to the property along the line of said street, in form but not in fact, as provided
297 and required in said Act; and also proceeded, in form but not in fact, to ascertain and set down in said report a description of the several subdivisions or lots of land included in the districts designated in the proviso contained in Section 3 of said Act, with the sum or amount which the said Board pretended to have estimated each lot has been, or will be benefited by reason of the widening of said street, and completed their report in form as required by said Act; and the same was completed on the 23d day of September, 1876, and was filed by said Board in the County Court of said City and County of San Francisco, on the 27th of October, 1876.

298 That each of said lots taken for the widening of said Dupont street, was a portion of a larger lot owned by the same person who owned the part taken, and the taking of each of said lots for said widening was in effect the same as taking thirty feet in depth from the rear of each of said larger lots, for the reason that after the lot was taken, the remainder still fronted upon the said Dupont street, as widened; that is to say, that the value of the thirty feet of each lot taken is and was the difference between the value of the whole lot before the taking and the value of the same lot diminished in depth thirty feet. Nevertheless the said Commissioners in fix-
299 ing the value of the land to be taken treated it as of the same value as a front lot of only thirty feet in depth, and estimated its value at above 200 per cent. greater than it in fact was, and knowingly, wilfully and intentionally ascertained and determined the value of the lots taken to be more than three times as much as they in fact were, by reason whereof the cost of the said widening was made three times as great as it ought to have been.

That the said Board of Commissioners in ascertaining and setting down in said report the sum or amount in which each lot included in the lands hereinbefore de-
300 scribed has been or will be benefited by reason of the widening of said street, wilfully, knowingly and intentionally adopted a false rule for the ascertainment thereof, and one which was and is neither equal nor uniform. They did not in estimating benefits, consider the lots which by the widening would become front lots, by reason of being given a frontage on the street as widened, as rear lots before the widening, but did consider them as front lots, and as deriving only the same benefit as the lots on the opposite side of the street which already had a frontage, and wilfully and intentionally omitted from their estimate of benefit on said

301 lots on the west side thereof, about two-thirds of the actual benefits derived by them respectively.

That in fixing the ratio of benefits on all and every portion of the property assessed for benefits in said report, the said Board wilfully and knowingly adopted a false rule for the ascertainment thereof, in this: that they computed the same upon the increased value of the property after the widening, instead of upon the increase in value thereof; that the effect of the adoption of this rule was, and is to make the various assessments for benefits grossly unequal and wholly wanting in uniformity, and this was well known to the said Commissioners, and the
302 same was intentionally done by them.

That said Board of Commissioners, aftey they had estimated in full all the cost and expenses which could properly, or at all arise in the said widening of said Dupont street, arbitrarily and illegally added thereto the further sum of seventy thousand nine hundred and thirty-five dollars, and knowingly and wilfully included in their estimate of the expense of said widening, said sum of seventy thousand nine hundred and thirty-five dollars, no part of which was, in any manner, authorized by said Act, or in any manner necessary for the work provided for in said Act, nevertheless the same is concluded in the
303 report of said Board, as confirmed, and is included in the assessment for widening said street, and in the levy therefor, hereinafter mentioned. And said Board of Commissioners have so negligently and carelessly managed their affairs, that they have permitted the whole, or greater portion of said sum of seventy thousand nine hundred and thirty-five dollars to be drawn out, misappropriated, and coverted and utterly lost, by some person or persons to these plaintiffs unknown.

That notice that the said report was open for the free inspection of all parties interested, for any period of

304 thirty days, was not published by said Board daily, for twenty days in any two daily newspapers published in said City and County of San Francisco, and the notice required by Section 7 of said Act, was never published in any two papers daily for twenty days, as therein provided and required, or at all.

That at divers dates, between the 5th day of October, 1876, and the 25th day of October, 1876, William Sharp, Theodore Meetz, B. Simon, T. H. Blythe, George W. Osborn, James Phelan, David Hunter, P. Marsicano, L. Carivaux and Josephine Robinet, each filed objections in the said County Court to the said report, and proposed
305 and threatened to contest the same before the said Court, and were about to contest the same for the matters hereinbefore set forth, and other matters; and thereupon the said Commissioners, to induce them to withdraw their said objections, and to prevent the said matters from becoming publicly known, secretly and collusively, and fraudulently entered into an arrangement with said objectors respectively, by which said objectors agreed to withdraw their said objections, and the said Board of Commissioners by their attorney agreed, in consideration thereof, to change, or procure to be changed, their said report as to the property of said objectors, so as to reduce
306 or cause to be reduced, the amount of estimated benefits on the property of said T. H. Blythe from $97,308, as originally stated in said report, to $39,653; and to reduce, or cause to be reduced, the amount of estimated benefits on the property of said Meetz and Simon from $20,758, as stated in said report, to $15,758; and to reduce, or cause to be reduced, the amount of estimated benefits on the property of said William Sharp from $2.288, as stated in said report, to $2,038; and to reduce, or cause to be reduced, the amount of estimated benefits on the property of said George W. Osborn from $17,444, as stated in said report, to $12,444; and to reduce, or cause to be reduced,

307 the amount of estimated benefits on the property of said James Phelan from $98,427, as stated in said report, to $78,427; and to reduce, or cause to be reduced, the estimated benefits on the property of said David Hunter from $25,205, as stated in said report, to $17,205; and to reduce, or cause to be reduced, the estimated benefits on the property of P. Marsicano from $15,844, as stated in said report, to $11,844; and to reduce, or cause to be reduced, the estimated benefits upon the property of L. Carivaux from $4,653, as stated in said report, to $3,400; and to increase, or cause to be increased, the estimated value of the property of James Phelan, taken for said widen-
308 ing, from $15,000, as stated in said report, to $25,000; and to increase, or cause to be increased, the estimated value of the property of Josephine Robinet, taken for said widening, from $16,000, as stated in said report, to $20,000; and to increase, or cause to be increased, the valuation of the property of David Hunter taken for said widening, from $2,438, as stated in said report, to $5,174; and thereupon, in pursuance of said arrangement, upon the consent of the said objectors, respectively, and of the said Commissioners, the said County Court entered an order as to each objector, directing the said Board of
309 Commissioners to modify the said report as above stated, and in accordance with said arrangement.

That said changes and modifications were ordered by said Court, upon the consent of the said objectors and Commissioners alone, without any investigation of the subject matter of the objections, and without any actual consideration of the merits, and without any proofs of any kind.

That said changes and alterations were made by the said Board of Commissioners and consented to as aforesaid for the sole purpose of inducing the said persons to withdraw their objections, and to prevent an examination

310 on the merits, and to prevent publicity as to the said frauds contained in the said report, and without the consent, knowledge or approval of the other persons affected by the said assessment, and the said orders were in fact obtained by fraud and collusion and imposition upon the said Court.

That in making said changes and alterations, deductions and additions, a different mode of estimating the extent of benefits and the value of property taken was applied to the property of said persons above named, from that which was in said report applied to the property of the other persons affected by said assessment, to
311 the great detriment and disadvantage of said other persons, including these plaintiffs, and thereby and by said changes and alterations the burden of assessment upon the said other persons whose property was assessed was increased upwards of $125,000 and all equality and uniformity of assessment upon the various lots and subdivisions assessed, was destroyed, and this was knowingly and intentionally done by said Commission.

That the said order of said County Court directing the modification of said report was made and entered in said Court on the 18th day of December, 1876, on which day the said Court made another and further order in the
312 same proceedings upon the application of the Attorney for said Board of Dupont Street Commissioners continuing the further hearing in said matter till December 19th, 1876, on which last named day, on motion of the Attorney for said Board, the further hearing of said matter was, by an order made and entered in said County Court, continued till December 22d, 1876; that thereupon, on said 19th day of December, the Attorney for said Board having learned that one G. K. Fitch was about to file in said County Court his objections to the confirmation of said report, immediately called a meeting of said Board, at which meeting the various changes and modifications

313 so ordered by said County Court were made, and on the 20th day of December, 1876, said Attorney, by direction of said Board, filed the said report, as modified, with a petition for the confirmation thereof; and obtained from said Court, without notice to said objectors, or to any of them, and without any hearing upon the merits, or investigation by said Court, an order pretending to confirm said report as modified as aforesaid, and vacating and setting aside the said order of December 19th, 1876, continuing the hearing of said matter till said December 22d, 1876.

314 That after the said Thomas H. Blythe had filed his objections in the said County Court, as hereinbefore stated, and while he was claiming, or about to claim in said Court that said Board in estimating the value of property taken, had adopted the wrong rule in estimating the value thereof, as stated in paragraphs VII and VIII hereof, the said Board of Commissioners, in order to induce the said Blythe to withdraw his objections, entered into an arbitration with the said Blythe, and by agreement between the said Blythe and the said Board of Commissioners, D. C. McRuer, Thomas D. Matthewson and Eugene McCarthy were appointed arbitrators, and it

315 was submitted to them as such arbitrators, to determine what amount of the fair and legitimate cost of the widening of Dupont street should be assessed upon the property of said Blythe, and it was agreed by the said Board, in the matter of said arbitration, that the said arbitrators, in making their determination, should consider the whole subject of allowance for damages to land and the apportionment of benefits, the same as though nothing had been done in the premises by any one theretofore, and that the said arbitrators should take as a basis for allowing damages, the difference in value between the lots on the west side of Dupont street, as they were before the widening, and the value of the same lots diminished in

depth thirty feet. That said arbitrators thereupon proceeded to make their estimates accordingly, and they found and ascertained and reported to said Board of Commissioners, that the value of the whole land taken for said widening, under the rule last stated, was only $246,240, instead of $639,913, as found by the said Board of Commissioners, under the rule adopted by them; and they, said arbitrators, further found, ascertained and reported to said Board of Commissioners, that said Blythe's property would be benefited and should pay only the sum of $39,653, instead of $97,308, as found by said Board of Commissioners, and thereupon the said Board of Commissioners, for the purpose of inducing said Blythe to withdraw his exceptions, as stated in the preceding paragraph hereof, consented to change and diminish the amount of estimated benefits on the property of said Blythe, from $97,308 to $39,653, and the same was done, as stated in the last preceding paragraph hereof. That none of the other parties affected by said assessment, had any notice of the matters in this paragraph alleged, or any opportunity whatever to contest the same, or to be heard thereon; but the same and the whole thereof was concealed by the said Board of Commissioners from the plaintiffs, and all the other persons whose property was and is affected by the said pretended assessment.

That said Board of Commissioners never did in fact, nor did any member thereof ascertain or determine the value of the several lots and subdivisions of land, or any of them, or buildings, or any of them, included in the land taken for the widening of said Dupont street, or the damage done to the property along the line of said street, or any of it, or the amount which the said lots assessed, or any of them, would be benefited by reason of the widening of said street; on the contrary, said Board of Commissioners, instead of themselves personally examining into said matters, employed certain persons whom

319 they called or designated experts, to ascertain and determine all and singular, said matters for them; and said Board of Commissioners, in fact, adopted the estimates of said experts as to all said matters, and embodied them in said report without ever in fact having made any estimate of their own.

That at all the dates and times in this complaint mentioned, A. J. Bryant, Mayor of the City and County of San Francisco, and one of the persons named in said Act as a Commissioner, and one of said Board of Dupont Street Commissioners, was a property owner on said street, and was the owner of real property situate on the
320 east side of said street, which, by said Act, was liable to be, and was in fact assessed for said widening of said Dupont street, and was also, as plaintiffs are informed and verily believe, the owner of, and largely interested in the lands on the west side of said street, which were taken for the widening thereof, which said interest stood of record in the names of persons other than said Bryant; and these plaintiffs aver, upon and according to their information and belief, that said Bryant was thus interested in the lot on the northwest corner of said Dupont street and O'Farrell street.

321 That the experts appointed by said Board of Commissioners, as hereinbefore alleged, were Richard Ivers, C. H. Reynolds and George Worn. That said Richard Ivers, while acting as such expert, was interested in the lot on the northwest corner of said Dupont and O'Farrell streets, being thirty-six and one-half feet on Dupont street by a uniform depth of eighty feet. That he, as agent for said Bryant and himself, purchased the same from John Griffin, after the experts had made their estimates, and before they had reported them to the said Board of Commissioners, and took the title in the name of Robert Watt and Francis Berton.

That the said Robert Watt and Francis Berton ad-

322 vanced the greater portion of the money to pay for the same on behalf of said Ivers and Bryant, and took the joint notes of said Ivers and Bryant to themselves, to evidence the repayment to said Watt and Berton of $60,000 of the purchase money of said lot.

That the said C. H. Reynolds was the broker who made the sale of the said property for said John Griffin, and received for his compensation in making said sale the sum of $2,500.

That the said experts reported and said Board of Commissioners awarded for the taking of the thirty feet of said lot taken for said Dupont street the sum of $38,354,
323 and for the improvements thereon, the sum of $4,286, and the portion of the lot which remained after cutting off the thirty feet for widening, was worth not less than $60,000, and the said plaintiffs aver that the said A. J. Bryant was not a disinterested Commissioner in the matter of said improvement, but was in fact acting in all said matters as a judge in his own cause.

And these plaintiffs further aver upon and according to their information and belief, that the said A. J. Bryant was interested in other pieces of property affected by said assessment during all the times herein mentioned,
324 and said interests were at all said times concealed and held in the names of persons unknown to these plaintiffs.

That notwithstanding the said Board of Dupont Street Commissioners never in fact acquired jurisdiction to widen any portion of said Dupont street; and notwithstanding that said notices were none of them given as hereinbefore alleged, the said Board of Dupont Street Commissioners did proceed as aforesaid to organize, estimate and report as aforesaid, and upon the confirmation of said report, although the total cost of the improvement was fixed by the report as confirmed at only $914,941, yet the said Commissioners proceeded to issue, and did issue

Block No. 118.

Cash value of lands taken.		Cash value of Improvements taken or damaged.		Total Amounts.		REMARKS.
Dollars.	Cts.	Dollars.	Cts.	Dollars.	Cts.	
$18,386		~~$2,438~~ $5,174		~~$20,824~~ $23,560		NOTE—The alteration on this page in the column headed "Cash value of improvements taken or damaged," and "Total amount" have been made as directed by the order of the County Court, made Dec. 18th, 1876.

502 *i* The following is a copy of the "Summary of Damages" contained at the end of said report:

SUMMARY OF DAMAGES.

Value of real estate taken	~~639,913~~
	654,063
Damages to improvements	~~126,501~~
	129,237
	~~766,414~~
	783,300
503 *i* Actual and contingent expenses of Commission	131,691
Grand Total	~~898,105~~
	914,991

Approved and adopted September 23d, 1876.

A. J. BRYANT,
Mayor of the City and County of San Francisco.

GEORGE F. MAYNARD,
Auditor.

WM. P. HUMPHREYS,
City and County Surveyor.

504 *i* [SEAL.] Board of Dupont Street Commissioners.

The erasures appearing in the foregoing were made in the original by drawing red ink lines across the original figures, and writing the substituted figures in ordinary ink underneath the said originals.

The following is a copy of the first page of the Report of said Dupont Street Commissioners as to benefits:

508

Report of the Board of Dupont Street Commissioners in the matter of the widen-
lands benefited, and enhanced

In this Assessment Roll the following abbreviations are used for the words set opposite them: N., Northerly; S., Southerly; E., Easterly; W., Westerly; Ft., Feet; St., Street; N. W., Northwesterly; S. W., Southwesterly; N. E. Northeasterly; S. E., Southeasterly; Imp., Improvements; Sts., Streets; No., Number; Cor., Corner.

FIFTY-VARA

Subdivision No. of block	Names of owners and claimants.	This property is assessed to parties listed and to all owners and claimants known or unclaimants of any interest, present or future therein, or any lien					
		The side of the street on which lot is situated.	The street on which lot is situated.	The point of beginning	Thence running.	In what direction.	On the line of what street.
509							
1	Unknown owners on Assessor's books assessed to T. H. Blythe.	Beginning at the northeast corner of Dupont and O'Farrell streets;					
		line of Dupont street, one hundred and thirty-seven and one-half feet; thence					
		and twenty-five feet to the westerly line of Brooks street; thence southerly					
		four feet to a point; thence southeasterly along the line of Brooks street thirty-					
		Market street; thence southwesterly along said line of Market street, one hun-					
		northerly line of O'Farrell street, and thence westerly along said line of					
		one-half inches to the easterly line of Dupont street and point of beginning.					
2	Unknown owners on Assessor's books, assessed to T. H. Blythe.	Beginning on the southerly line of Geary street at a point distant forty					
		Dupont street; thence easterly along the southerly line of Geary street eighty-					
		erly one hundred and thirty-seven and one-half feet; thence at right angles					
		five feet to the easterly line of Dupont street; thence at right angles northerly					
		street sixty-seven and one-half feet; thence at right angles easterly sixty feet;					
		twenty feet; thence at right angles westerly twenty feet, and thence at angles					
		line of Geary street and point of beginning.					

510

ing of Dupont Street, in the City and County of San Francisco, Showing the value of each subdivision, &c.

SURVEY, BLOCK No. 98.

known, also assessed to all owners and upon the same.			Present Value.		Enhanced value, or amount of benefits assessed.		TOTAL.		REMARKS.
Thence running at right angles.	Thence running at right angles.	Thence running at right angles to point of beginning.	Dollars.	Cts.	Dollars.	Cts.	Dollars.	Cts.	
thence northerly along the easterly									
at right angles easterly one hundred									
along said line of Brooks streets thirty-									
four feet to the northwesterly line of									
dred and twenty-nine feet to the					48240				NOTE—The alterations on this page in the column headed "Enhanced value or amount of benefits assessed," have been made as directed by the order of the County Court, made Dec. 18, 1876.
O'Farrell street forty feet one and					13500				
feet easterly from the easterly line of									
five feet; thence at right angles south-									
westerly one hundred and twenty-									
along said easterly line of Dupont									
thence at right angles northerly					43873				
northerly fifty feet to the southerly					23187				

Endorsed: Report Benefits. Widening Dupont Street. Report of Dupont Street Commissioners. Filed in County Court October 27th, 1876.

THOS. H. REYNOLDS, Clerk,
By Wm. B. Smith, Deputy Clerk.

514 In the original that portion of said first page above the lowest horizontal line shown on the foregoing copy was printed with the exception of the number of the Block which was written, and that portion thereof below said horizontal line was written in ink. The succeeding pages were *fac similes* of said first page with the exceptions of the numbers of the Blocks and those portions thereof which were written in ink. In said original report under the printed head lines of names of owners and claimants and against each lot or subdivision there were set down the words "unknown owners on the assessor's books assessed to—" which words were followed as to
515 each lot or subdivision with the names of the respective parties to whom the same were assessed upon the assessor's books.

The following are copies of the pages and portions of said report of benefits showing the erasures, changes and alterations made in the original report.

516

520

Subdivision No. of Block	Names of owners and claimants.	The side of the street on which lot is situated.	The street on which lot is situated.	The point of beginning.	Thence running.	In what direction.	On the line of what street.
3	Unknown owners; on Assessor's books assessed to Lewis Buck.			S. E. corner of Dupont and Geary Sts.	40 ft.	E.	S. Line of Geary St.
4	Unknown owners; on Assessor's books assessed to T. H. Blythe.	S.	Geary St.	145½ ft. E. from Dupont St.	30 ft.	E.	S. Line of Geary St.
521 5	Unknown owners; on Assessor's books assessed to A. F. Sawyer.	S.	Geary St.	175½ ft. E. from Dupont St.	20½ ft.	E.	S. Line of Geary St.
6	Unknown owners; on Assessor's books assessed to T. H. Blythe.	S.	Geary St.	196 ft. E. from Dupont St.	10¼ ft.	E.	S. Line of Geary St.

Subdivision No. of block	Names of owners and claimants.	The side of the street on which lot is situated.	The street on which lot is situated.	The point of beginning.	Thence running.	In what direction.	On the line of what street.
522 7	Unknown owners on Assessor's books assessed to T. H. Blythe.	Beginning on the northwesterly line of Market street at a point distant six inches northeasterly from the northerly line of O'Farrell street; thence running Market street, fifty-three and one-fourth feet; thence northerly and parallel with seven feet and eleven and one-eighth inches; thence at right angles westerly right angles southerly ninety-two and one-half feet; thence southeasterly line of Market street and the point of beginning.					

Block No. 98.

Thence running at right angles.	Thence running at right angles.	Thence running at right angles to point of beginning.	Present Valve. Dollars.	Cts.	Enhanced Value, or amount of Benefits Assessed. Dollars.	Cts.	TOTAL. Dollars.	Cts.	REMARKS.
S. 50 ft. S. 20 ft.	E. 20 ft. W. 60 ft.	N. 70 ft.			$22,568				
S. 74½ ft.	W. 30 ft.	N. 74½ ft.			~~$2,424~~ $2,264				NOTE.—The alterations on this page in the column headed "Enhanced value or amount of Benefits assessed," have been made as directed by the order of the County Court, made December 18th, 1876.
S. 77½ ft. N. 3. ft.	W. 50½ ft. E. 30 ft.	N. 74½ ft.			$1,311				
S. 77½ ft.	W. 10¼ ft.	N. 77½ ft.			~~$522~~ 602				

Block No. 98.

Thence running at right angles.	Thence running at right angles	Thence running at right angles to point of beginning.	Present Value. Dollars.	Cts.	Enhanced value, or amount of benefits assessed. Dollars.	Cts.	TOTAL. Dollars.	Cts.	REMARKS.
ne hundred and forty-nine feet and ing northeasterly on said line of e east line of Dupont street seventy- ty feet and nine inches; thence at venty-eight feet to the northwesterly					~~$2,249~~ $ 100				NOTE—The alteration on this page in the column headed "Enhanced value or amount of benefits assessed," has been made as directed by the order of the County Court, made Dec. 18, 1876.

526

Subdivision No. of Block	Names of owners and claimants.	The side of street on which lot is situated.	The street on which lot is situated.	The point of beginning.	Thence running.	In what direction.	On the line of what street.
17	Unknown owners on Assessor's books, assessed to Meetz and Simon.			S. E. corner of Dupont and Post Sts.	60 ft.	S.	E. Line of Dupont St

527

528

Subdivision No. of block	Names of owners and claimants.	The side of street on which lot is situated.	The street on which lot is situated.	The point of beginning.	Thence running.	In what direction.	On the line of what street.
4	Unknown owners on Assessor's books assessed to Wm. Sharp.	N.	Post St.	111½ ft. E. from Dupont St.	26 ft.	E.	N. line of Post St.

Block No. 97.

Thence running at right angles.	Thence running at right angles.	Thence running at right angles to point of beginning.	Present Value. Dollars.	Present Value. Cts.	Enhanced Value, or amount of Benefits Assessed. Dollars.	Enhanced Value, or amount of Benefits Assessed. Cts.	TOTAL. Dollars.	TOTAL. Cts.	REMARKS.
E. 60 ft.	N. 60 ft.	W. 60 ft.			~~$20,758~~ $15,758				NOTE.—The alterations on this page in the column headed "Enhanced value or amount of Benefits assessed," have been made as directed by the order of the County Court, made December 18th, 1876.

Block No. 96.

Thence running at right angles.	Thence running at right angles	Thence running at right angles to point of beginning.	Present Value. Dollars.	Present Value. Cts.	Enhanced value, or amount of benefits assessed. Dollars.	Enhanced value, or amount of benefits assessed. Cts.	TOTAL. Dollars.	TOTAL. Cts.	REMARKS.
N. 73 ft.	W. 26 ft.	S. 73 ft.			~~$2,288~~ $2,038				NOTE—The alteration on this page in the column headed "Enhanced value or amount of benefits assessed," has been made as directed by the order of the County Court, made Dec. 18th, 1876.

532

Subdivision No. of Block	Names of owners and claimants.	The side of street on which lot is situated.	The street on which lot is situated.	The point of beginning.	Thence running.	In what direction.	On the lin what stre
533 9	Unknown owners on Assessor's books, assessed to Geo. W. Osborn.	N.	Ashburton Place.	46 ft. E. from Dupont St.	46 ft.	E.	Ashburt Place.

Subdivision No. of block	Names of owners and claimants.	The side of street on which lot is situated.	The street on which lot is situated.	The point of beginning.	Thence running.	In what direction.	On the line what street
534 10	Unknown owners; on Assessor's books assessed to Geo. W. Osborn.			N. E. Cor. of Dupont St. and Ashburton Place	50 ft.	N. E.	E. line o Dupont S
11	Unknown owners; on Assessor's books assessed to Jas. Phelan.			S. E. Cor. of Dupont and Sutter Sts.	137½ ft.	E.	S. line o Sutter St
12	Unknown owners; on Assessor's books assessed to Jas. Phelan.	S.	Sutter St.	137½ ft. E. from Dupont St.	68¾ ft.	E.	S. line o Sutter St

Block No. 96.

On the line of what street.	Thence running at right angles.	Thence running at right angles.	Thence running at right angles to point of beginning.	Present Value. Dollars.	Present Value. Cts.	Enhanced Value, or amount of Benefits Assessed. Dollars.	Enhanced Value, or amount of Benefits Assessed. Cts.	TOTAL. Dollars.	TOTAL. Cts.	REMARKS.
Ashburton Place.	N. 50 ft.	N. 46 ft.	S. 50 ft.			~~$ 5,617~~ $ 4,617				NOTE.—The alteration on this page in the column headed "Enhanced value or amount of Benefits assessed," has been made as directed by the order of the County Court, made December 18th, 1876.

Block No. 96.

On the line of what street.	Thence running at right angles.	Thence running at right angles.	Thence running at right angles to point of beginning.	Present Value. Dollars.	Present Value. Cts.	Enhanced value, or amount of benefits assessed. Dollars.	Enhanced value, or amount of benefits assessed. Cts.	TOTAL. Dollars.	TOTAL. Cts.	REMARKS.
E. line of Dupont St.	E. 46 ft.	S. 50 ft.	W. 46 ft.			~~$11,827~~ $7,827				NOTE—The alterations on this page in the column headed "Enhanced value or amount of benefits assessed," have been made as directed by the order of the County Court, made Dec. 18th, 1876.
S. line of Sutter St.	. 137½ ft.	N. 137½ ft.	N. 137½ ft.			~~$51,929~~ 42,867				
S. line of Sutter St.	. 137½ ft.	N. 68¾ ft.	N. 137½ ft.			~~$4,938~~ 4,000				

538

Subdivision No. of Block	Names of owners and claimants.	The side of street on which lot is situated.	The street on which lot is situated.	The point of beginning.	Thence running.	In what direction.	On the line of what street.
				NOTE—Wherever in the descriptions following, the line of Dupont street is referred to, it is the west line of said Dupont street, as it will exist after the widening of said street to the width of seventy-four feet under the provisions of an Act of the Legislature of the State of California entitled "An Act to authorize the widening of Dupont street, in the City of San Francisco," approved March 23, 1876.			
539							
14	Unknown owners on Assessor's books assessed to D. Hunter.	W.	Dupont St.	21 ft. north from Harlan Place.	42 ft.	N.	W. line of Dupont St.

540

Subdivision No. of block	Names of owners and claimants.	The side of street on which lot is situated.	The street on which lot is situated.	The point of beginning.	Thence running.	In what direction.	On the line of what street.
				NOTE.—Wherever in the description following, the line of Dupont street is referred to, it is the west line of said Dupont street, as it will exist after the widening of said street to the width of seventy-four feet, under the provisions of an Act of the Legislature of the State of California entitled "An Act to authorize the widening of Dupont street, in the City of San Francisco," approved March 23, 1876.			
18	Unknown owners on Assessor's books assessed to D. Hunter.			N. W. corner Dupont and Sutter Sts.	30 ft.	W.	N. line of Sutter St.

Block No. 118.

Thence running at right angles.	Thence running at right angles.	Thence running at right angles to point of beginning.	Present Value. Dollars.	Present Value. Cts.	Enhanced Value, or amount of Benefits Assessed. Dollars.	Enhanced Value, or amount of Benefits Assessed. Cts.	TOTAL. Dollars.	TOTAL. Cts.	REMARK
W. 107½ ft. E. 79½ ft.	S. 63 ft. N. 21 ft.	E. 28 ft.			~~$16,349~~ $11,349				NOTE.—The ...eration on this pa... in the column he...ed "Enhanced valu... or amount of Ben...fits assessed," has ...en made as directe... by the order of the C...nty Court, made ...ecember 18th, 187...

Block No. 118.

Thence running at right angles.	Thence running at right angles.	Thence running at right angles to point of beginning.	Present Value. Dollars.	Present Value. Cts.	Enhanced value, or amount of benefits assessed. Dollars.	Enhanced value, or amount of benefits assessed. Cts.	TOTAL. Dollars.	TOTAL. Cts.	REMARKS.
N. 40 ft.	E. 30 ft.	S. 40 ft.			~~$8,856~~ 5,856				NOTE—The alt... ation on this page ... the column head... "Enhanced value ... amount of benef... assessed," has be... made as directed ... the order of th... County Court, mad... Dec. 18th, 1876.

side of on which situated.	The street on which lot is situated.	The point of beginning.	Thence running.	In what direction.	On the lin what stre
		NOTE--Wherever in the description following, the line of Dupont street is referred to, it is the west line of said Dupont street, as it will exist after the widening of said street to the width of seventy-four feet under the provisions of an Act of the Legislature of the State of California entitled "An Act to authorize the widening of Dupont street, in the City of San Francisco," approved March 23, 1876			
		N. W. corner Dupont and Geary Sts.	40 ft.	W.	N. line Geary S

he side of et on which is situated.	The street on which lot is situated.	The point of beginning.	Thence running.	In what direction.	On the line what street.
		NOTE.—Wherever in the descriptions following, the line of Dupont street is referred to, it is the west line of said Dupont street, as it will exist after the widening of said street to the width of seventy-four feet, under the provisions of an Act of the Legislature of the State of California entitled "An Act to authorize the widening of Dupont street, in the City of San Francisco," approved March 23, 1876			
S.	Geary St.	80 feet west from Dupont Street.	$27\frac{6}{12}$ ft.	W.	S. line o Geary St

Block No. 120.

On the line of what street.	Thence running at right angles.	Thence running at right angles.	Thence running at right angles to point of beginning.	Present Value. Dollars.	Present Value. Cts.	Enhanced Value, or amount of Benefits Assessed. Dollars.	Enhanced Value, or amount of Benefits Assessed. Cts.	TOTAL. Dollars.	TOTAL. Cts.	REMARKS.
N. line of Geary St.	N. 50 ft.	E. 40 ft.	S. 50 ft.			~~$15,844~~ $11,844				NOTE.—The alteration on this page in the column headed "Enhanced value or amount of Benefits assessed," has been made as directed by the order of the County Court, made December 18th, 1876.

Block No. 121.

On the line of what street.	Thence running at right angles.	Thence running at right angles	Thence running at right angles to point of beginning.	Present Value. Dollars.	Present Value. Cts.	Enhanced value, or amount of benefits assessed. Dollars.	Enhanced value, or amount of benefits assessed. Cts.	TOTAL. Dollars.	TOTAL. Cts.	REMARKS.
S. line of Geary St.	$137\frac{6}{12}$ ft.	E. $27\frac{6}{12}$ ft.	N. $137\frac{6}{12}$ ft.			~~$4,653~~ 3,400				NOTE—The alteration on this page in the column headed "Enhanced value or amount of benefits assessed," has been made as directed by the order of the County Court, made Dec. 18th, 1876.

550

Subdivision No. of Block	Names of owners and claimants.	The side of street on which lot is situated.	The street on which lot is situated.	The point of beginning.	Thence running.	In what direction.	On the line what stree
				NOTE—Whenever in the description following, the line of Dupo said Dupont street, as it will exist after the widening of said stre provisions of an Act of the Legislature of the State of California e of Dupont street, in the City of San Francisco," approved Mar			
551							
1	Unknown owners on Assessor's books assessed to Jas. Phelan.			Lot commencing at the southwesterly corner of Dupo southerly on the westerly line of Dupont street twelve fe northwesterly line Market street; thence southwesterly c street two hundred and thirty-five feet eight and one-four Dupont street one hundred and fifty feet eleven inches and thence at right angles easterly along the southerly li ninety-one feet three inches to the point of beginning.			

Block No. 122.

Thence running at right angles.	Thence running at right angles.	Thence running at right angles to point of beginning.	Present Value. Dollars.	Present Value. Cts.	Enhanced Value, or amount of Benefits Assessed. Dollars.	Enhanced Value, or amount of Benefits Assessed. Cts.	TOTAL. Dollars.	TOTAL. Cts.	REMARKS.

street is referred to, it is the west line of to the width of seventy-four feet, under the titled "An Act to authorize the widening 23d, 1876.

and O'Farrell streets; thence running five and one-fourth inches to the said northwesterly line of Market inches; thence northerly parallel with the southerly line of O'Farrell street, of O'Farrell street one hundred and

~~$41,560~~
$31,560

NOTE.—The alteration on this page in the column headed "Enhanced value or amount of Benefits assessed," has been made as directed by the order of the County Court, made December 18th, 1876.

556 The following is a copy of the "Summary" contained at the end of said Report:

Subdivision No. of block	Names of Owners and Claimants.	The side of street on which lot is situated.	The street on which lot is situated.	THE POINT OF BEGINNING.			Thence running.	In what direction
			SUMMARY.					
	Dupont Street. East side.		Dupont Street. West side.	Side and Rear Streets. East.	Side and Rear Streets. West.	TOTALS.		
95	$63,047			$24,964		$ 88,011		
96	~~86,290~~ 73,228			~~24,895~~ 22,707		~~111,185~~ 95,935		
557 97	~~78,056~~ 73,056			36,332		~~114,388~~ 109,388		
98	~~70,808~~ 45,382			~~50,379~~ 18.150		~~121,187~~ 63,532		
118			~~$54,135~~ 46,135		$30,803	~~84,938~~ 76,938		
119			57,202		36,261	93,463		
120			70,598 66,598		36,349	~~106,947~~ 102,947		
121			114,088		~~22,338~~ 21,085	~~136,426~~ 135,173		
122	Gore Lot on Market, Dupont and O'Farrell Sts.					~~41,560~~ 31,560		
					Grand Total,	~~898,105~~		
					Grand Total.	796,837		

558

Adopted and approved September 19th, 1876.

SEAL.

A. J. BRYANT, Mayor,
GEO. F. MAYNARD, Auditor,
[illegible] P. HUMPHREYS, City and County Surveyor,
} Board of Dupont Street Commissioners

186

549 The erasures appearing in the foregoing were made in the original by drawing red ink lines across the original figures, and writing the substituted figures in ordinary ink underneath the said original.

The said report is very voluminous and for that reason insertion thereof is hereby waived with the right to either party on any hearing or argument of this cause in the Superior or Supreme Court to refer to or read said report, or any part thereof, and the same shall be considered by the Court with the same force and effect as if said report had been fully incorporated herein, but the summaries and altered pages thereof hereinbefore set
560 forth are correct copies of such summaries and pages as here are set forth in said report.

H. S. TIBBEY being duly sworn as a witness on behalf of plaintiff, testified as follows:

I was the Secretary of the Dupont Street Commissioners.

Question. Will you look at the book (presenting book), this is the appraisement of the benefits. (Witness does so). Were these red lines there when that report was filed in the County Court?

Answer. No, sir.
561

Plaintiff's Counsel. I propose to prove by him that he was Secretary of the Commission, and upon the order of the County Court and by direction of the Commissioners he drew those red lines there and put in the figures that the Court ordered.

Defendant's Counsel objected on the ground that the record explains itself and cannot be explained by parol.

The Court to Plaintiff's Counsel. I suppose it is necessary for you to show the order from the County Court.

Plaintiff's Counsel. I intend to show that. I intend to follow that up. I can prove but one thing at a time.

Board of Dupont Street Commissioners.
A. J. BRYANT, Mayor,
GEO. F. MAYNARD, Auditor,
J. [illegible], City and County Surveyor.
SEAL

562 Defendant objected to the question on the ground that the same was incompetent, irrelevant and immaterial.

The Court overruled the objection and permitted the witness to answer, and defendant duly excepted.

Exception No. 17.

Question. Were these red lines put there after the report was filed in the County Court?

Answer. Yes, sir.

Question. Who put them there?

Defendant objected on the ground that it was incompetent and immaterial.

563 The Court overruled the objection and the defendant duly excepted.

Exception No. 18.

Answer. These changes were made by Mr. Vincent under my supervision to conform to the various orders of the County Court directing these changes to be made.

He drew the red lines under the original figures where it was originally put in. These new figures were put in there by order of the County Court. I was directed to do this by the Commissioners and the Attorney.

Question. State if you know whether, when this matter was pending in the County Court, there was an arbi-
564 tration or proceedings of arbitration in regard to any particular assessment?

I am not asking about what the arbitration was, but if there had been, in relation to any particular man's property.

Defendant objected, on the ground that it was incompetent, irrelevant and immaterial.

The Court overruled the objection, and defendant duly excepted.

Exception No. 19.

Whereupon the witness answered.

Answer. Yes, sir, as to his assessment.

565 Question. What was done with reference to it; how did it arise?

Defendant objected on the ground that it was incompetent, irrelevant and immaterial.

The Court overruled the objection, and the defendant then and there duly excepted.

Exception No. 20.

Answer. The point seemed to have been reached where the opposition of Mr. Blythe could not be overcome, and I suggested to Mr. Strother, one of the property owners, that as to Mr. Blythe's assessment, it be submitted to arbitration of the parties; one should represent
566 the Board, another represent Mr. Blythe, and the third to be selected by these two. He thought it was a good idea, and went with me to see Gov. Haight about it. I saw Mr. Blythe's attorney, settled with, consulted with him, and it was agreed to. The arbitrators were appointed, they made their report to the Board, and that report was adopted. This was before the proceedings were begun in the County Court.

Question. Who were the arbitrators?

Defendant objected on the ground that it was incompetent, irrelevant and immaterial.

567 The Court overruled the objection, and defendant duly excepted.

Exception No. 21.

Answer. The Board appointed T. D. Matthewson. This was at an informal meeting of the Board. They were all present. Mr. Blythe selected E. J. McCarthy, and these two, Mr. D. C. McRuer.

CROSS-EXAMINED.

What I mean is, that these persons examined the matter, and reported to the Commissioners what their opinion was on the subject, and that was adopted by the Commissioners.

568 This matter was submitted by me to Mr. Strother, one of the parties interested in this proceeding, and who was interested in seeing the matter successfully carried through.

Q. Did any other of the property owners apply to you in reference to the improvements being carried through?

Plaintiff objects to the question as not proper cross-examination.

The Court sustained the objection and defendant duly excepted.

Exception No. 22.

569 D. C. McRuer, being duly sworn as a witness on behalf of plaintiff, testified as follows:

I am the McRuer spoken of by Mr. Tibbey as one of the arbitrators. I was called upon by Mr. Matthewson, who informed me that he had been appointed as one.

Defendant objected to the testimony as incompetent, irrelevant and immaterial.

The Court overruled the objection and defendant excepted.

Exception No. 23.

He stated to me that he had been appointed as an arbitrator in connection with the Dupont Street widen-
570 ing. Understood him that he had been appointed by the Commissioners. That Blythe had appointed Eugene McCarthy, and that they two desired me to act as referee, and I consented to do so. They afterwards invited me to act with them as an arbitrator. I met with them and we considered the matter between Mr. Blythe and the Commissioners, and after looking over the papers I told them I thought it desirable that we have some specific instructions from the parties with reference to it. They conceded that, and we applied to the Commissioners for some specific instructions, and we received a paper signed by the attorneys of the various parties giving us the necessary instructions in regard to procedure.

571 Plaintiff next offered in evidence the paper containing the written instructions.

Defendant objected on the ground that the same was incompetent, irrelevant and immaterial.

The Court overruled the objection, and defendant duly excepted.

Exception No. 24.

Whereupon the same was read in evidence, as follows:

To Messrs. McRuer, McCarthy and Matthewson.

Gentlemen: The question to be submitted to you for determination is this:

572 What amount of the fair and legitimate cost of widening Dupont street should be assessed upon the property of Mr. Blythe?

In arriving at this result, it will, of course, be necessary to consider the whole subject of allowance for damages to land, and the apportionment of benefits, the same as though nothing had been done in the premises by any one heretofore. But while it will be necessary for you to consider the whole subject, it is desired by the parties interested that you state simply the result as it affects the property of Mr. Blythe.

573 A fair result of the assessment would be arrived at by taking, as a basis for allowing damages, the difference in value between the lots on the west side of the street as they now are, and the value of the same lots diminished in depth thirty feet; and it is the understanding that this is the basis to be adopted by the arbitrators for assessing the property of Mr. Blythe. He and the Commissioners are the only parties to this arbitration, and the sole purpose of it is to determine Mr. Blythe's assessment.

Yours, respectfully,

H. H. Haight,

Approved. *Atty. for Blythe.*

574 While the above theory of awarding damages is not the theory of the statute as I read it, I am willing that the arbitrators should consider Mr. Blythe's assessment in the light of that theory, and to report finally on a fair assessment of his property.

WM. P. PIERSON,
Atty. for Commis.

Question. Will you state to the Court what you did under this paper?

Answer. We proceeded to make a calculation in regard to a proper assessment of Mr. Blythe's property.

575 Defendant objected to this testimony, on the ground that the same was incompetent, irrelevant and immaterial.

The Court overruled the objection, and defendant duly excepted.

Exception No. 25.

Witness continued: We saw that it would probably reduce Mr. Blythe's assessment to the neighborhood of $40,000. I said to my associates that we had better call the Commissioners together, and report to them our labors so far, and they would at least withdraw the report and have a readjustment.

576 We did call the Commissioners together, and they appeared with their counsel. We then pointed out to them what we conceived to be a just and equitable adjustment. They were rather reticent. One of the Commissioners remarked, with reference to my opinion, that there were various opinions in regard to that matter. And, after a conference of perhaps half an hour, they rose to leave; and the Attorney for the Commissioners remarked, to the effect that it was understood that nothing should be said about this matter.

Defendant objected to the witness testifying to anything that was said.

587 Q. *By Plaintiff's Counsel.* This was in the presence of the Commissioners, wasn't it?

A. Yes, sir, in the presence of the Commissioners.

Defendant's Counsel. Let him confine himself to what was done, and not what was said.

Plaintiff's Counsel. I want to show what was said, of course, and everything that transpired there.

The Court. That is competent. The Court overruled the objection and defendant excepted.

Exception No. 26.

The Witness. I replied to the Attorney that I considered myself under no obligation of secrecy in the matter,
588 and they left.

In making up my estimate, I pursued the theory contained in the paper received from the Commissioners.

Plaintiff offered in evidence the report of the Arbitrators.

Defendant objected on the ground that it was incompetent, irrelevant and immaterial.

The Court overruled the objection, and defendant excepted.

Exception No. 27.

Whereupon the report was read in evidence, and is as
589 follows:

To Hon. H. H. Haight,

Atty. of T. H. Blythe.

Hon. Wm. M. Pierson,

Atty. of Dupont Street Commissioners.

Gentlemen: The undersigned, appointed to determine the amount that T. H. Blythe should contribute on account of his property in Block 98, for the expense of widening Dupont street, beg leave to report that they have fully considered the subject, and find that he should contribute thirty-nine thousand, six hundred and fifty-three dollars ($39,653), and that he will be entitled to $8.32

580 per cent. of the amount of $70,935.00 not expended for contingent expenses.

We hand you with this a diagram, showing apportionment of contribution.

Very respectfully yours,

E. McCarthy,

T. D. Mathewson,

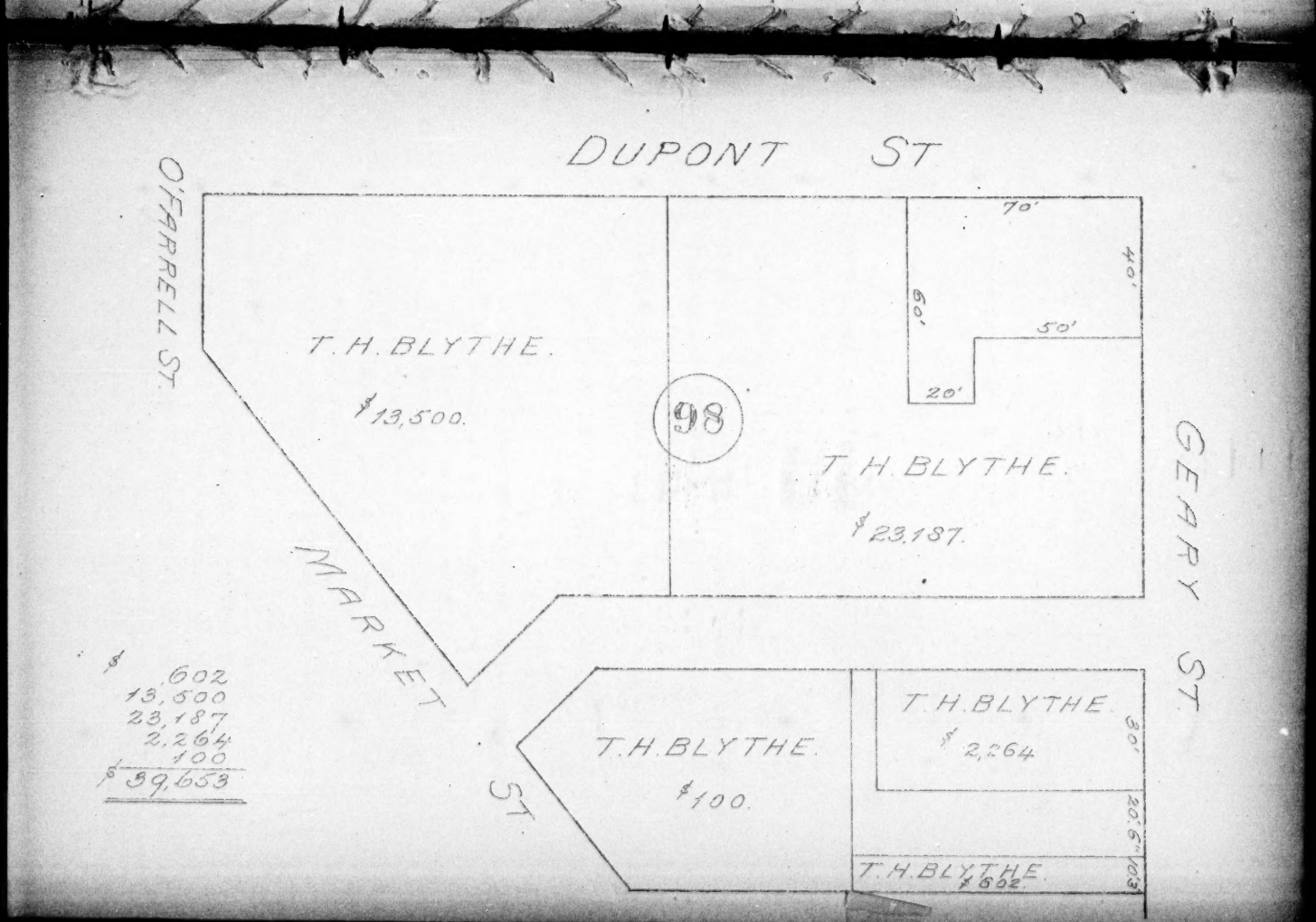
D. C. McRuer,

Referee.

San Francisco, Dec. 12, 1876.

581

582


DUPONT ST
O'FARRELL ST.
GEARY ST.
MARKET ST.
T. H. BLYTHE.
$13,500.
98
T. H. BLYTHE.
$23,187.
70'
40'
50'
20'
100'
T. H. BLYTHE.
$100.
T. H. BLYTHE.
$2,264
30'
20.6"
T. H. BLYTHE.
$602.
$ 602
13,500
23,187
2,264
100
$ 39,653

589 METHOD:

Damages for land taken	$246,240
" all'd for improvements	126,501
Expenses as made up by this Com	32,755
Contingent Fund	70,935
Total	476,431
Estimated total benefits	$1,066,547
Necessary ass't 44.67 per cent	476,431
Benefit to Block 98	124,519
Necessary ass't 44.67 per cent	55,623

590 Of the $55,623, Blythe's property should pay $39,653.

Question. Were any explanations made to you by the Commissioners or their attorney, as to what had been the rule adopted by the experts before?

Defendant objected, on the ground that it was incompetent, irrelevant and immaterial.

The Court overruled the objection, and defendant duly excepted.

Exception No. 28.

Answer. I think the rule employed by the experts was explained to me by one of the experts, Mr. Ivers.

591 Question. At any time was the rule adopted by the experts, talked over between you and the Commissioners or their attorney?

Defendant objected, on the ground that it was incompetent, irrelevant and immaterial.

The Court overruled the objection and defendant excepted.

Exception No. 29.

Answer. Well, when we first met that was discussed, I think, with Mr. Blythe's attorney, Mr. Haight, and I don't recollect whether Mr. Pierson was present or not, with reference to the method to proceed to discover the proper amount for Mr. Blythe to pay. Don't recollect

592 that I ever had any special conversation with either of the Commissioners with reference to the method that they employed. I deducted from the work the method that was employed without reference to any conversation. I saw what their theory was from the work accomplished.

Question. At the time when you went back, you said you had got to a point where you thought the thing was wrong, and you went to the Commissioners ?

Answer. This matter was discussed at the time, and I endeavored to point out to them what I considered to be an erroneous computation for the damages sustained.

The rule that was adopted by the experts was referred
593 to in that conversation, and the difference between our rule and their rule talked over.

I illustrated to them, so far as I was able, the injustice of the method adopted by the experts, and they seemed to have very little to say in regard to the matter, except that there were various opinions of other persons very different from what I had in regard to that.

Question. State how you illustrate it.

Defendant objected on the ground that it was incompetent, irrelevant and immaterial.

The Court overruled the objection, and defendant ex-
594 cepted.

Exception No. 30.

Answer. I showed them that the burden of widening Dupont street would be very largely thrown upon the property holders upon the east side of the street, and so far as I could, I illustrated to them the difference between their method and the method we had adopted, showing the difference of the burden to be borne by the lots on the east side of the street. I don't know that I can state any thing further of what took place at that time than I have; that we showed them what appeared to us clearly to be a manifest injustice towards property owners on the east side of the street.

595 Question by defendant's attorney. Allow me to interrupt you a moment. You say "manifest injustice." To save some cross-examination, allow me to ask you whether you refer to the instructions which they gave you, or the general plan of the experts? Whether you were remonstrating against what they required you to do, or the injustice of the plan of the experts.

Answer. No, sir; the injustice of the plan of the experts. For instance, in estimating the damage to a lot on the west side of the street, they allowed to each lot a damage equal to taking the entire lot thirty feet in depth. If a person owned only
596 thirty feet in depth, then they would consequently allow him the whole value of his lot. They did that if there was such a case, or presumed there was such a case. They allowed a man full value for a lot thirty feet in depth; they also allowed the next man that had a hundred feet in depth, say the same sum taken from the front of his lot, so we contend that was unjust, because that man was only damaged in having his lot diminished thirty feet in depth, and the rule to be applied was, that thirty feet of lot 100 feet in depth, front 30 feet, was worth fifty-four and seven-tenths of the whole sum—of the whole value of the lot.

597 Presuming it was 100 feet in depth, that was the standard established; and it was established upon the theory of well established commercial principles, that a lot, say 25 feet in depth is worth one-half as much as a lot 100 feet in depth, and the theory is, it is worth in proportion to the square root of the part taken with reference to the square root of the whole. A lot 100 feet in depth, the square root of that would be ten. The square root of 30 would be five and four-sevenths—therefore, a front lot, thirty feet in depth, is worth five and four-sevenths of ten, or fifty-four and seven one-hundredths of one hundred. We contend that that was an unjust

598 principle to be applied, and if they applied that principle, I acknowledge that they might proceed upon that theory, but in case they did, that the residue of the lot, that thirty feet must be estimated at the balance of the price as being fifty-four and seven one-hundreths, the rear seventy feet would be worth forty-five and thirty-one hundredths of the whole sum; that was the price to have put upon them with reference to the estimation of the benefit.

I presume that I made these same arguments and illustrations to the Commissioners. The 30 feet of the front of this lot which is worth $24,000, the 30 feet front of
599 that is worth, according to their rule, $13,128, with 30 feet cut off. They allowed these parties, with a lot of that size, valued at $800 per front foot, $13,128, with 30 feet cut off. According to our rule, 30 feet cut off would be substantially 30 feet cut off from the rear of that lot, and it would be worth $3,912, so the difference would be the difference between $3,912 and $13,128.

We found after the report was made up that they allowed but $13,128 to the front of that lot. They had then assessed, the benefits to be derived from that rear lot, the same as they had assessed on the lot on the east side of the street of the same depth and of the same
600 size. Whereas the lot on the east side of the street had a frontage on that lot 44 feet wide, and the rear of that lot had no frontage on any street, and the rear of this lot 30 by 70, that lot they allowed was benefited by that rule $10,872, whereas the lot on the east side of the street was worth by the same rule, $20,088, and they assessed those two lots the same sum in the way of benefits. They didn't estimate that rear lot which was worth by this rule $10,872, to be benefited any more than the lot on the opposite side of the street that was worth $20,088—that is, they treated it as a front lot cut off, and as a front lot

601 to *assess the benefits*. That was called to the attention of the Commissioners, and talked over at that time.

CROSS-EXAMINATION.

Question. You state that Mr. Pierson requested secrecy of you. I would like to ask you, Mr. McRuer, if you understood that you were engaged in any improper transaction.

Answer. I didn't consider myself engaged in any improper transaction.

Question. Did you think there was any thing dishon-
602 est or anything improper in trying to reach a fair and equitable adjustment of the rights of parties?

Answer. I did not.

Question. Any occasion for concealment of them?

Answer. I saw none.

Question. Was or was not the matter extensively spoken of and canvassed in the papers at the time?

Answer. Not that I know of.

Question. You didn't see these reports of these proceedings touching the widening of this street were published in the Evening Post at that time?

Answer. I might have seen the report as presented to
603 the Court was published.

I thought the Commissioners and the experts were actuated by something more than difference of opinion. I thought so, because I saw it calculated, and by a mathematical demonstration they were wrong. I did not think they were actuated by anything more than mere difference of opinion until the matter was explained to them. I thought first, perhaps it was the result of ignorance. I thought it was impossible for them to understand it, but when it was explained, any person could see the method they had for it was an unjust method; and on that account I ascribed improper motives; and, even

604 if they were acting under the advice of counsel, wouldn't change my opinion in regard to it.

I afterwards wrote some communication to the papers about it—after I was satisfied they were going to push their report through the Court.

My object in calling the Commissioners together was to show them what was apparent on the face. I thought it was inequitable.

Afterwards I wrote a communication to the papers setting forth the principle adopted, and what I conceived to be the correct principle. This was published before the confirmation of the report of the Commissioners. My
605 object in doing it was to prevent the confirmation.

By the Court. Question. By the face of the thing, you don't mean any written report they had made?

Answer. The adjustment. We had their plan—their diagram—before us, showing the amount of damages marked upon each lot, and the amount of benefits assessed to each lot, and upon that we acted, and showing them the difference between the burden to be borne and the estimate, as we had made it up under their instruction, and the estimate made up by the experts.

When I speak of it being apparent upon the face of the papers that an inequitable theory had been acted
606 upon, I mean the diagram that was presented to us, showing the amount of damages and benefits as made out by the experts upon that work—the diagram and papers prepared by the experts.

JOHN A. RUSSELL, being duly sworn as a witness on behalf of plaintiff, testified as follows:

I have with me a copy of resolution of the Board of Supervisors of this City and County, numbered 8561, new series, adopted March 27, 1876. It was never passed to print or signed by the Mayor; it was simply adopted.

Resolution 8693, new series, was finally passed by the

607 Board, May 1, 1876, and approved—I mean, signed by the Mayor—May 3, 1876. I have it here. It was published.

That is the only resolution passed under the Act providing for the widening of Dupont street. No other action was taken by the Board of Supervisors upon that subject.

CROSS-EXAMINATION.

These resolutions were passed on the dates stated by me. I know that the resolution was passed to print. I suppose it was. It should be printed five times.

608 I didn't look over the files of the newspaper to see if it had been published five times. It is required to be published five days, with the ayes and noes. I am not satisfied it was done. I don't examine the files of the newspapers to find out. I know, at the time of the resolution we paid particular attention to it. It was deemed necessary to confer jurisdiction upon the Commissioners. That was the very reason that I didn't.

THOMAS D. MATTHEWSON, being sworn as a witness on behalf of plaintiff, and examined, testified as follows:

I am one of the persons that was arbitrator of this
609 Blythe matter.

The Commissioners came to the office where we—McRuer, McCarthy and myself—were working.

Question. State what you recollect about that matter; as to what happened before the Commissioners.

Defendant objected, on the ground that it was incompetent, irrelevant and immaterial.

The Court overruled the objection, and defendant then and there duly excepted.

Exception No. 31.

Answer. The Commissioners came there to the office, and we explained to them that we thought that they had made a mistake in their charges against the property on

610 the west side of the street; that is, they had allowed more than we thought they had a right to allow.

In looking over the theory of allowance made to those parties for land taken, we thought they charged too much; and the theory they worked on didn't agree with the theory we thought it ought to be arbitrated on; and we explained that to them, and I think we pointed out the difference between the two theories. It was four years ago, and I don't recollect everything. It was clear, in my mind, what the difference was then, and is now. This was substantially explained to the Commissioners.

611 Question. What was said and done by the Commissioners in regard to this matter?

Defendant objected, on the ground that the same was incompetent, irrelevant and immaterial.

The Court overruled the objection, and defendant then and there excepted.

Exception No. 32.

Answer. That it was going to cost a great deal too much—the way they were making the awards on the west side. We didn't think they ought to have that much money. We thought the cost of opening the street could be very much reduced. What we thought should
612 be an equitable adjustment, they didn't think so, and we disagreed on that.

Wm. M. Pierson, being sworn as a witness on behalf of plaintiff, testified as follows:

I was the attorney of the Board of Dupont Street Commissioners. I am cognizant of what was done with the objections that were filed by the various parties in the County Court.

Question. Will you state how it was those several objections were disposed of—the arrangement?

Defendant objected to the testimony, on the ground that it was incompetent, irrelevant and immaterial.

613 The Court overruled the objection, and defendant duly excepted.

Exception No. 33.

Question withdrawn.

Q. While the objections were pending in the County Court, were any negotiations made by you with the objectors, and what, if any?

Defendant objected, on the ground that the same was incompetent, irrelevant and immaterial.

The Court overruled the objection, and defendant duly excepted.

Exception No. 34.

614 A. I can hardly answer that question without stating exactly what was done. Certain persons filed objections to the report, at various times. They were represented by attorneys.

These objections were filed at intervals—not altogether—and various dates assigned for their hearing. At first, as soon as they were filed, or received by the Board or by me, they were submitted to the Board of Dupont Street Commissioners, and the Board determined whether they would accede to the objection; and if they thought that the objection was good in part, and whether they should yield in part. Upon their acting
615 either in conceding the whole objection or a portion of it, I would wait upon the attorneys who represented the objectors, and if they consented to the concession made, we would go into the Court together, and either he or I would state the objection of so and so, the Commissioners thought was a valid one, and we consented that the report be referred back to the Commissioners, for amendment in that particular regard.

No trial, of course, was had upon any such objection. It was a mere statement made by me or the opposing attorney, that we had agreed upon the modification; that is, a modification in their case.

616 [Witness is shown some papers,]

Those are the orders. Whether they are all or not, I do not know. They purport to be orders made by the County Court.

Q. Take this one; Thos. H. Blythe, dated 18th of December, 1876. This orders various changes in the assessment of Mr. Blythe for benefits.

A. Yes, sir. One place reduces the amount from $48,240 to $13,500. In another place from $43,873 to $23,187. Another from $2,424 to $2,264. Another from $522 to $602. Another from $2,249 to $100. In these reductions I simply went in with Mr. Blythe's attorney,
617 and he or I stated what I have stated here, and the Judge made the order. We did not explain to the Judge why these changes were made; we had agreed as attorneys of the respective parties to those modifications, Gov. Haight for Mr. Blythe and I for the Board of Commissioners.

The order in the case of Phelan reduced the benefits on one parcel from $41,560 to $31,560. In another place from $51,929 to $42,867. In another place from $4,938 to $4,000; and then added $10,000 on the value of the lot taken, Subdivision 1, in Block 22, changed the valuation of the lot taken, thirty feet, from $15,000 to $25,000.
618 I negotiated this with Jarboe & Harrison and agreed upon those figures, after the Board of Commissioners authorized me to do so.

This was done in the same way, and they were all done in the same way. There was no hearing in the County Court or any further explanation to the Court than what I have stated.

Q. You didn't in every case negotiate with the attorney, on every objection—it was something with the client?

A. Well, I don't recollect of any such case.

Q. Take Osborn's case, for instance?

619 A. I don't know so far as Mr. Osborn was concerned; you (referring to plaintiff's counsel) represented him.

Q. If I had an objection there I never spoke to you about it.

A. It is very possible. I don't know whether I ever talked with you about that, or Mr. Fifield. Mr. Fifield represented———. He was then your partner. You represented separately separate persons.

Q. He represented Dickson. My name was signed to Mr. Osborn's?

A. Yes, sir. Of course I regard you as the one in that matter.

620 Q. Yes, sir?

A. I think that I talked to Mr. Fifield. If my memory serves me right, Mr. Fifield was in Court when Mr. Osborn's——

Q. Objection was made?

A. Yes, sir.

Q. What I want to ask you is, whether you didn't make an arrangement as to the amount with Mr. Osborn himself, both as to that and Dickson's?

A. I can't remember. Mr. Osborn was in rather a peculiar situation. He was a very active man about the

621 business. He was perhaps more so than any other man in the district. It was quite possible that the negotiations were made with him.

Q. Now, then, as to all of these objections, they were all done substantially in the same way?

A. Yes, sir.

Q. There was no hearing in the County Court or any further explanations to the Court than what you have stated?

A. No, sir.

CROSS-EXAMINATION.

There was no secrecy about how these things were

done, no conspiracy on the part of counsel concerned to impose upon the County Court that I am aware of. There was no attempt to overreach or take any unfair advantage of any one.

I understood that it was nothing more than an endeavor on the part of the Commissioners to harmonize the objections of the property owners.

Question. Mr. McRuer has stated here on the stand that himself, Mr. Matthewson and Mr. McCarthy, made a a report to the Commissioners, and that you requested that it be kept a secret. Would you be kind enough to state to the Court what you did say or do on that occasion in that respect?

Answer. Well, I don't believe that I can state what I said on that occasion. We had some very high words on that subject. My recollection is, that after they were appointed to arbitrate as regards Mr. Blythe's particular assessment, Mr. McRuer wanted to have the power to extend his scrutinizing eye over the whole district. My recollection is, that I did, in some sort of a way, authorize that, in order to get at Mr. Blythe's particular assessment. They might look into the theory of the whole district. When we received notice from Mr. McRuer—at least from the Board of Arbitrators—they were ready to report, I discovered that they had gone to work and assumed the entire functions, and made new assessments of the whole district, which I thought was beyond their function and beyond their power, and we had some high words about it. Mr. McRuer made a threat that he was going to make the thing public. I said to him there was no occasion to make a new assessment of the whole district. I think I told him he might make it public and be damned, or something of that kind. It created a great deal of feeling. Mr. McRuer seemed to think he was the only honest man connected with the business.

625 I am practicing law—have been for 19 years. I advised the Commissioners in the discharge of their duty in making these assessments, after a very thorough and patient examination—advised them what was, in my judgment, a correct construction of the law.

In addition, I asked them to call in the aid of McAllister and Bergin, to see if my construction was correct, which they did.

I cannot say that the changes and modifications of the report were known to any particular persons affected. These orders of the County Court were not made at the same time—they were made at intervals along during
626 thirty days. They were published in the papers. (By order of the Court, this remark about the publication in the papers was, on objection of plaintiff's counsel, stricken out.) Outside of some particular individuals, I cannot state of my own knowledge that the property owners knew of the changes.

The parties within the district, so far as I knew, were very anxious about the completion of these improvements. I did not know of any dissent at all. I don't suppose that I was ever in personal contact with one-quarter of them. I was brought in contact with those that were
627 owners there on the west or east side of Dupont street—those that were principally interested.

Q. Will you be kind enough to state to the Court, whether or not the parties interested advised and urged the Commissioners to accede or make any concession to the objecting parties to secure a speedy completion of the improvements—any of them?

A. Yes, sir; a part of them did. A part of them did orally and a part of them did in writing. There was a writing. I didn't see the signatures. There was a petition—what was called a petition.

These orders of the County Court on the several objections which have been referred to here, were always

628 had in open Court, at the regular time when the Court was open.

All of the objectors had notice of the action taken in the matter, either personal or through their counsel. I think, in every instance, the attorney of the objector went with me into the County Court. I recollect of no instance where he did not.

Most unquestionably there was no occasion for secrecy. I didn't suppose I was doing anything wrong in the matter. I attended as adviser of the Board to the completion. The bonds were issued by the Commissioners. Under the Act the Commissioners were required to pub-
629 lish notices inviting proposals. There was a great deal of difficulty in getting the bonds disposed of. Some of the property owners took bonds in lieu for their damages. We had to publish, I think, two or three times before the bonds were finally sold. The difficulty was, the Act put them too high—at 95 cents. It was hard to negotiate them at that figure. They were all sold—sold or taken by property owners.

The work was done — the street was widened and the land required taken possession of. I don't think the Commissioners finished their work for
630 about six or seven months after the report was confirmed by the County Court. The completion was in 1877, and before the end of that year the whole thing was absolutely finished. Should say before the first of October, 1877.

I think the physical work of widening the street was completed after the bonds were disposed of.

As soon as the report was confirmed, property owners commenced to pull down their buildings. For the period of three or four months it was a demoralized looking street. It was during that time that the bonds were sold. The buildings were not all pulled down the same time.

631 Of course no man pulled down his building until he got his money or his bonds; when a man would agree to take bonds, we would give him bonds or money, and then he would pull down his building. No man would allow us to take possession of his property until he got his money or his bonds.

Plaintiff next offered in evidence the objection of Wm. Sharp to the widening of Dupont street, dated October 5, 1876, and filed same day; the proceedings in the County Court, and in the same connection the order of the Court made on the 9th day of October, 1876, which is as follows:

632 " In the matter of widening Dupont street, on motion " of R. W. Hent, Esq., attorney for Wm. Sharp, peti- " tioner herein, it is ordered that the hearing of said " petition be set for Friday, the 13th day of October, " 1876, at 2 o'clock P. M.; and it is further ordered, this " order be filed and entered *nunc pro tunc* as of October " 5, 1876."

Plaintiff next offered in evidence the Minute Order of the County Court, Friday, October 13, 1876, which is as follows:

" In the matter of widening Dupont street: By con-
633 " sent and upon motion it is ordered: That the objec- " tion of Wm. Sharp to the confirmation of the report " of the Commissioners herein be set for hearing on " Friday, October 20, 1876, at 2 o'clock, P. M."

Plaintiff next offered in evidence the petition of James Phelan, filed in the County Court on the 20th of October, 1876, which is as follows:

" In the matter of the widening of Dupont street:

To the Honorable, the County Court in and for the City and County of San Francisco.

The petition of James Phelan respectively shows:

That at the last session of the Legislature of this State, an Act was passed entitled, "An Act to authorize the

widening of Dupont street, in the City and County of San Francisco," which said Act was approved March 23d, 1876, and took effect immediately.

That by the 8th Section of said Act, it is provided that any person interested in any piece or parcel of land situated within the district defined and described in Section Three of said Act, or in any of the lands taken for said street, or in any improvements damaged by the opening of said street, feeling himself aggrieved by the action or determination of the Board of Dupont Street Commissioners, provided for by said Act, as shown in the report provided for in Section Seven of said Act, may, any time within thirty days after the completion of said report, and the publication of a notice that the same is open for inspection, apply by petition to the County Court of the City and County of San Francisco, setting forth his interest in the proceedings had before said Board, and his objections thereto, for an order on said Board, requiring it to file with said Court, the report of said Board, and such other documents or data as may be pertinent thereto in the custody of said Board, and used by it in preparing said report.

That your petitioner is the owner of the following described lots of land, situated and included within the district described and designated in Section Three of said Act, as the district benefited by said improvement, and upon which the cost of making the same is to be assessed, viz:

1st. That lot of land circumscribed by a line commencing at the southeasterly corner of Sutter and Dupont streets, and running thence easterly along the southerly line of Sutter street, one hundred and thirty-seven feet and six inches; thence at right angles southeasterly one hundred and thirty-seven feet and six inches; thence at right angles westerly one hundred and thirty-seven feet and six inches, and to the easterly line of Dupont street;

637 and thence northerly along the last named line one hundred and thirty-seven feet and six inches, and to the point of beginning.

2d. That lot of land circumscribed by a line commencing at a point on the southerly line of Sutter street, distant one hundred and thirty-seven feet and six inches easterly thereon from the easterly line of Dupont street, and running thence easterly along said southerly line of Sutter street sixty-eight feet and nine inches; thence at right angles southerly one hundred and thirty-seven feet and six inches; thence at right angles westerly sixty-eight feet and nine inches; and thence at right angles northerly
638 one hundred and thirty-seven feet and six inches, and to the southerly line of Sutter street, at the point of beginning.

3d. That lot of land circumscribed by a line commencing at the southwesterly corner of O'Farrell and Dupont streets, as the same will exist after the widening of Dupont street, as proposed in said Act, and running thence southerly along said proposed westerly line of Dupont street twelve feet and five and one-fourth inches, and to the northwesterly line of Market street; and thence southwesterly along said northwesterly line of Market
639 street two hundred and thirty-five feet and eight and one-fourth inches; thence northerly, parallel with Dupont street, one hundred and fifty feet and eleven inches, to the southerly line of O'Farrell street; and thence at right angles easterly along said southerly line of O'Farrell street one hundred and ninety-one feet and three inches, and to the point of beginning.

And is also the owner of the following described lot of land, which is proposed to be taken for the widening of said street, and the improvements thereon, viz:

That lot of land circumscribed by a line commencing at the intersection of the southerly line of O'Farrell street with the northwesterly line of Market street,

640 thence running westerly, on the southerly line of O'Farrell street, seventeen feet and three and one-fourth inches; thence at right angles southerly twelve feet and five and one-fourth inches, to the northwesterly line of Market street; and thence northeasterly, along said line of Market street, twenty-one feet and three and one-half inches, and to the point of beginning.

That said Board of Dupont Street Commissioners have completed the report provided for by Section seven of said Act, and have caused notice to be published, as provided in said Section, that the same is open for inspection.

641 That the first publication of said notice was made on the 23d day of September, A. D. 1876, and that thirty days have not expired since the completion of said report.

That in said report said Board have set down a description of each of the aforesaid subdivisions or lots of land included in the district designated in Section three of said Act, and have set against each of said lots or subdivisions the name of your petitioner as the owner and claimant thereof.

That opposite to the descriptions thereof, and against the respective lots or subdivisions, above described, said
642 Board have set the following sums or amounts as the sum or amount in which, according to the judgment of the Board, said lots will be respectively benefited by reason of the widening of said street, relatively to the benefits accruing to the other lots of land within said designated district, viz:

Opposite the first of said lots the sum of $51,929.

Opposite the second of said lots the sum of $4,938.

Opposite the third of said lots the sum of $41,560.

That in said report said Board has stated and set down the description of the lot and subdivisions of land above described, and which is included in the land taken for

643 the widening of said Dupont street, and has stated the sum of fifteen thousand dollars as its actual cash value, and the sum of five hundred and seventy-five dollars as the damage done to the improvements thereon.

All of said valuation having been made by said Board on the basis of gold coin.

Your petitioner further shows and states in his objections to said report, and as reasons why said report should not be approved or confirmed by this Court.

1st. The Board of Supervisors of the City and County of San Francisco have never, by resolution or order, expressed in any form that it was their judgment that it
644 would be expedient that Dupont Street be widened in accordance with and in the mode prescribed by said Act, and have never passed any resolution or order expressing their judgment upon the subject of widening Dupont street, as authorized by Section twenty-one of said Act.

2d. The said Board of Dupont Street Commissioners have never published the notices provided for by Section six of said Act. The only notice published by said Commissioners, adopted April 14th, 1876, and under which the Secretary of said Board subsequently caused a notice to be published in the "Daily Evening Bulletin" and the
645 "Daily Alta California," did not specify any papers in which the said notice should be published, nor did the said Commissioners give to said Secretary any authority to publish said notice in said papers.

The publication by him in said papers was without authority, and insufficient to comply with the requirements of Section six of said Act.

3d. The said report shows that the value of the land taken and the damages to improvements thereon or adjacent thereto and injured thereby, and all other expenses whatsoever incidental to the taking and widening of said street, is as follows, viz:

646 Value of real estate taken.....$639,913
Damage to improvements..... 126,501
Actual and contingent expenses of Commission..... 131,691

$898,105

The said Board, at its meeting on the 23d day of September, A. D. 1876, adopted "as the report of actual expenses incurred and estimated, expenses actual and contingent, to be incurred in the matter of widening Dupont street from Bush to Market street, viz.," various items
647 amounting in the aggregate to the sum of $131,691.

That one of the items specified therein, and constituting a part of said estimated amount of $131,691, is the following, viz:

"Estimated incidental expenses to accrue up to and until the close of the duties of the Board, advertising, removing improvements, expenses of any litigation that may arise, drawing deeds, damages, if any, for change of grade, and any other item of damage and expense that may be incurred and not set forth in this report, $98.-935.71."

The valuation of benefits to the land within the dis-
648 trict was adopted by the Board before this estimate of expense had been agreed upon, viz., on September 16th, 1876, and this item is evidently a "forced balance," adopted for the purpose of making the "cost" equal the benefits.

Said item of estimated expense is grossly disproportionate to any possible expense that may be incurred under the provisions of the Act, and is illegally included in said report, and is without any authority therefor in said Act.

All the expenses that may accrue or be legally included, are included in other items in the resolution adopted on said date.

649 By the second Section of said Act, the cost of widening said street is defined to be "the value of the land taken," "the damages to improvements thereon," "and all expenses whatever incident to the widening of said street."

By the Act itself the expense of removing the improvements is to be borne by the owners thereof, or the purchasers under the sale of the same; the parties making the deeds are to prepare and tender the same to the Board. The expense of grading the street is to be assessed upon the adjacent property in the same manner as if the said street remained of its original width, and
650 there is no fact presented and nothing shown from which it can be inferred that any litigation will arise, or that there are or will be any damages, from any change of grade.

Your petitioner, therefore, makes the objection that nine per cent. and upwards of the entire cost of the proposed improvements, for conjectured expenses that may never arise, and which are not shown to have any foundation in fact, or to be based upon any fact or principal, is greatly in excess of what should be allowed, and ought not to be assessed upon the property which is by the Act compelled to bear the expense of widening said street.

651 Only fixed and definite expenses can be allowed under said Act as a proportion of the "cost of widening said street," and such expenses should be specifically set forth in the report, so that persons interested may know for what purpose their land is taxed.

4th. The assessment or appraisement of benefits against the aforesaid lots of land belonging to your petitioner as shown by the said report is unjust, relatively unequal to the amounts assessed to other lots, and disproportionate to the benefits which are stated in said report as accruing to other lots of land within the district designated by said Act.

652 (1.) An inspection of said report shows that the lots of land first and secondly above described are assessed as more highly benefited by said improvement than other land in exactly the same relative location; whereas land in exactly the same relative location—should be assessed at exactly the same benefit. 655

(2.) The land on the western side of Dupont street will be more benefited by said improvement than the land on the eastern side of said street.

This proposition has been acted upon by said Board in making its assessment, inasmuch as they have assessed the land along said street at a higher rate upon the west-
653 ern than upon the eastern side in each block, except in the blocks between Sutter and Post streets. In these blocks the Board has assessed the eastern side at a higher rate than it has the western side; and your petitioner avers and shows that by the assessment of his aforesaid lots lying between those streets on the eastern side of Dupont street at a higher rate than the lots on the western side of the street, whereas in every other instance, the lots on the western side of the street are assessed higher than on the eastern side. The said assessment is disproportionate and unjust, and an injury is thereby
654 wrought against your petitioner to the extent of ten thousand dollars, and the aforesaid lots of land are assessed at a higher rate for benefits than would accrue to said lots relatively to the benefits accruing to other lots in said district. 656 657

(3.) The principal upon which said assessment has been made is, that the relative benefits to the land within said district, increase as the land lies further south from Bush street, and that the ratio of increase is greater as Market street is approached, but this principle has been violated in the assessment of the lot of your petitioner, secondly above described.

That lot of land has been assessed for benefits and en-

655 hanced value at the sum of $4,938, while land of precisely the same dimensions, lying adjacent thereto to the south, and in the same block, has been assessed for only the sum of $4,237.

(4.) The amount assessed againt the lot thirdly above described as its relative enhanced value by reason of said widening of Dupont street, viz: $41,560, is grossly disproportionate to the relative benefit which said lot will receive by said improvement.

Said lot having a frontage on Market street, the proposed widening of Dupont street will injure its rental
656 value, and diminish the income to be derived from it, and your petitioner states and shows that said lot will be injured by the proposed improvement, and will receive no benefit whatever, and ought not to be assessed in any sum whatever for said improvement.

(5.) The amount of damages allowed for the lot above described, as taken for the widening of said street, is inadequate, and less than its actual value.

Said lot is worth the sum of fifty thousand dollars, whereas the said Board have allowed only the sum of fifteen thousand dollars therefor.

(5.) The Act of the Legislature under which the pro-
657 ceedings of said Commissioners have been taken, is unconstitutional and void, and conferred no authority to make any assessment for benefits, or of damages for the taking of any property.

(1.) By the said Act, its operation is to depend upon the will of the Board of Supervisors of the City and County of San Francisco, and is, therefore, an attempt to delegate legislative power to that Board.

(2.) It authorizes an assessment for local improvement within the City and County of San Francisco, to be made by Commissioners designated by the Legislature itself, and not by the municipal authority, and is an assessment

made by the Legislature itself, without the intervention or sanction of the municipal authority.

(3.) It authorizes the assessment and levying of taxes for improvements by persons not chosen by the district within which said assessment is to be made or taxes levied.

(4.) It attempts to deprive your petitioner of his property without an opportunity to have its value estimated by a jury, and to deprive him thereof without due course of law.

(5.) Being an attempted exercise of the right of eminent domain, said law is in conflict with the general law on that subject, and is not uniform in its operation.

Your petitioner therefore prays for an order on said Board of Dupont Street Commissioners, requiring it to file with this Court the report of said Board, and all documents and data pertinent thereto in the custody of said Board, and which were used by it in preparing said report.

And that upon filing the same, this Court will make such further order in the premises as may be just.

JAMES PHELAN.

JARBOE & HARRISON,

Attorneys for Petitioners.

And also: The petition of Blythe in the same matter, filed October 20th, 1876, which as follows:

"IN THE MATTER OF THE WIDENING OF DUPONT STREET

To the Honorable the County Court in and for the City and County of San Francisco:

The petition of Thomas H. Blythe respectfully shows: That at the last session of the Legislature of this State an act was passed entitled "An Act to authorize the widening of Dupont street in the City and County of

San Francisco," which said Act was approved March 23d, 1876, and took effect immediately.

That by the 8th section of said Act it is provided that any person interested in any piece or parcel of land situated within the district defined and described in section three of said Act, or in any of the lands taken for said street, or in any improvements damaged by the opening of said street, feeling himself aggrieved by the action or determination of the Board of Dupont Street Commissioners, provided for by said Act, as shown in the report provided for in section seven, of said Act, may, at any time within thirty days after the completion of said report and the publication of a notice that the same is open for inspection, apply by petition to the County Court of the City and County of San Francisco, setting forth his interest in the proceedings had before said Board and his objections thereto for an order on said Board requiring it to file with said Court the report of said Board, and such other documents or data as may be pertinent thereto in the custody of said Board and used by it in preparing said report.

That your petitioner is the owner of the following described lots of land situated and included within the district designated in section three of said Act as the district benefited by said improvement and upon which the cost of making the same is to be assessed, viz.:

1. Commencing on the northwesterly line of Market street at its intersection with the easterly line of Dupont street; thence north on the easterly line of Dupont street 137 6-12 feet: thence at right angles east 125 feet to the west line of Brooks street; thence south on said line of Brooks street 34 feet; thence southeast on said line of Brooks street 34 feet to the northwesterly line of Market street; thence along the northwesterly line of Market street to the easterly line of Dupont street and point of commencement.

664 2d. Commencing at a point on the easterly line of Dupont street 137 6-12 feet north from the intersection of Market and Dupont streets; thence north 67 6-12 feet; thence at right angles east 60 feet; thence at right angles north 20 feet; thence at right angles west 20 feet; thence at right angles north 50 feet to the southerly line of Geary street; thence at right angles east on said line of Geary street 85 feet to the westerly line of Brooks street; thence at right angles south on the west line of Brooks street 137 6-12 feet, and thence at right angles west 125 feet to point of commencement.

665 3d. Commencing at the northeast corner of Brooks and Geary streets; thence east along the southerly line of Geary street 30 feet; thence at right angles south 74 6-12 feet; thence at right angles west 30 feet, to the earterly line of Brooks street; and thence at right angles north 74 6-12 feet, to the point of commencement.

4th. Commencing at a point on the southerly line of Geary street 50 feet east from the easterly line of Brooks street; thence east on said line of Geary street 10 3-12 feet; thence at right angles south 77 6-12 feet; thence at right angles west 10 3-12 feet; and thence at right angles north 77 6-12 feet to point of commencement.

666 5th. Commencing at the intersection of the northerly line of Market street with the easterly line of Brooks street; thence northeasterly on Market street 53 4-12 feet; thence northerly 77 $\frac{11\,1\text{-}8}{12}$ feet; thence at a right angle westerly 60 9-12 feet, to the easterly line of Brooks street; thence at right angles southerly on the easterly line of Brooks street 92 6-12 feet; and thence southeasterly on Brooks street 28 feet, to Market street, the point of commencement.

That said Board of Dupont Street Commissioners have completed the report provided for by Section 7 of said Act, and have caused notice to be published as provided in said section. That the same is open for inspection.

667 That the first publication of said notice was made on the 23d day of September, A. D. 1876, and that thirty days have not expired since the completion of said report.

That in said report said Board have set down a description of each of the aforesaid subdivisions or lots of land included in the district designated in Section three of said Act, and have set against each of said lots or subdivisions the name of your petitioner as the owner and claimant thereof.

That opposite to the descriptions thereof, and against the respective lots or subdivisions above described, said
668 Board have set the following sums or amounts, as the sum or amount, in which, according to the judgment of the Board, the said lots will be respectively benefited by reason of the widening of said street, relatively to the benefits accruing to other lots of land within said designated district, viz.:

Opposite the first of said lots the sum of $48,240.

Opposite the second of said lots the sum of $43,873.

Opposite the third of said lots the sum of $2,424.

Opposite the fourth of said lots the sum of $522.

Opposite the fifth of said lots the sum of $2,249.

That in said report said Board has stated and set down
669 the description of the lots and subdivisions of land above described, and which is included in the land taken for the widening of said Dupont street, and has stated the sum of ninety-seven thousand three hundred and eight dollars as the damages done to the improvements thereon; all of said valuations have been made by said Board on the basis of gold coin.

Your petitioner further shows and states as his objections to said report, and reasons why said report should not be approved or confirmed by the Court—

1st. The Board of Supervisors of the City and County of San Francisco have never by resolution or order ex-

670 pressed in any form that it was their judgment that it would be expedient that Dupont street be widened in accordance with and in the mode prescribed by said Act, and have never passed any resolution or order expressing their judgment upon the subject of widening Dupont street, as authorized by Section 21 of said Act.

2d. The said Board of Dupont Street Commissioners have never published the notice provided for by section six of said Act. The only notice published by said Commissioners was before the resolution referred to in the twenty-first section of said Act had been passed by the Board of Supervisors, and the resolution adopted by said Com-
671 missioners April 14th, 1876, under which the Secretary of said Board subsequently caused a notice to be published in the *Daily Alta California* and the *Daily Evening Bulletin*, did not specify any papers in which the said notice should be published, nor did the said Commissioners give to said Secretary any authority to publish said notice in said papers.

The publication by him in said papers was without authority, and insufficient to comply with section six of said Act.

3d. The said report shows that the value of the land
672 taken and the damages to improvements thereon or adjacent thereto and injured thereby, and all other expenses whatsoever incidental to the taking and widening of said street, is as follows, viz:

Value of real estate taken	$639,913
Damage to improvements	126,501
Actual and contingent expenses of Commissioners	131,691
	$898,105

That said Board at its meeting on the 23d day of September, A. D. 1876, adopted as the report of actual expenses incurred and estimated expenses actual and

673 contingent to be incurred in the matter of widening Dupont street from Bush to Market street, viz:

Various items, amounting in the aggregate to the sum of $131,691.

That one of the items specified therein and constituting a part of said estimated amount of $131,691, is the following, viz:

"Estimated incidental expenses to accrue up to and until the close of the duties of the Board, advertising, removing improvements, expenses of any litigation that may arise, drawing deeds, damages if any from change of grade, and any other item of damage
674 and expense that may be incurred and not set forth in this report, $98,935.71."

The valuations of benefits to the land within the district was adopted by the Board before this estimate of expenses had been agreed upon, viz: on September 16th, 1876, and this item is evidently a "forced balance," adopted for the purpose of making the "cost" equal the benefits.

Said item of estimated expenses is grossly disproportionate to any possible expense that may be incurred under the provisions of the Act, and is illegally included
675 in said report, and is without any authority therefor in said Act. All the expenses that may accrue or be legally incurred are included in other items in the resolution adopted on said date.

By the second section of said Act, the cost of widening said street is defined to be "the value of the land taken," "the damages to improvements thereon," and all "expenses whatever incident to the widening of said street."

By the Act itself the expense of removing the improvements is to be borne by the owners thereof, or the purchasers under a sale of the same; the parties making the deeds are to prepare and tender the same to the Board, the expense of grading the street is to be assessed upon

676 the adjacent property in the same manner as if the said street remained of its original width, and there is no fact presented and nothing shown from which it can be inferred that any litigation will arise, or that there are or will be any damages from any change of grade.

Your petitioner therefore makes the objection that nine per cent. and upwards of the entire cost of the proposed improvement for conjectured expenses that may never arise, and which are not shown to have any foundation in fact or to be based upon any fact or principle, is greatly in excess of what should be allowed, and ought not to be assessed upon the property which is by the Act
677 compelled to bear the expense of widening said street. Only fixed and definite expenses can be allowed under said Act as a proper portion of the "cost of widening said street," and such expenses should be specifically set forth in the report, so that persons interested may know for what purpose their land is taxed.

The assessment or apportionment of benefits against the aforesaid lots of land belonging to your petitioner, as shown by the said report, is unjust, relatively unequal in the amounts assessed to other lots, and disproportionate to the benefits which are stated in said report as accruing to other lots of land within the district designated
678 by said Act.

The said lot just above described, and which is assessed $48,240 for said improvements as the estimated benefits accruing thereto, is not only not benefited in the least degree, but is absolutely injured by the widening of Dupont street, inasmuch as the current of travel is divided from Market street and the Market street front is thereby rendered less desirable for stores and retail business.

Petitioner further avers that as to the parcel of land secondly above described the amount assessed thereon is excessive, unequal and unreasonable; that no such ben-

679 efit could possibly accrue thereto; that if said lot were benefited at all by the widening of Dupont street, the benefit could not exceed five thousand dollars, and the amounts assessed upon the remainder of said lots are also excessive and unequal; that said Commissioners have not assessed the property on the west line of said street upon any principles of fairness or justice, but have assessed much less amounts for benefits than they should have done, and have made extravagant allowances for all property taken for the widening of said street.

Petitioner further alleges that said Act of the Legislature is unconstitutional and void.

680 Wherefore your petitioner prays for an order requiring said Board of Dupont Street Commissioners to file with this Court the report of said Board, and all documents and data pertinent thereto in the custody of said Board, and which were used by it in preparing said report.

THOS. H. BLYTHE,
H. H. HAIGHT,
Att'y for Petitioner."

And also: The petition of David Hunter filed on the 20th of October, 1876, which is as follows:

681 "*In the County Court of the City and County of San Francisco, State of California:*

In the matter of widening Dupont street.

DAVID HUNTER
vs.
BOARD OF DUPONT STREET
COMMISSIONERS.

To the Hon. the County Court of the City and County of San Francisco:

682 The petition of David Hunter, of said City and County, respectfully shows to the Court.

That he is aggrieved by the action and determination of the said Board in the amounts allowed and awarded as damages for the buildings situated on the lots of land owned by him and hereinafter described, portions of which land are taken for said street, and also in the amount assessed on said lots respectively as benefits, as more particularly hereinafter set forth.

That he is interested in said proceedings, to-wit: The owner in fee of the following described lots and parcels of land and the buildings thereon, situated in the City
683 and County of San Francisco, and within the district defined and described in Section 3 of an Act of the Legislature of the State of California, entitled, "An Act to authorize the widening of Dupont street in the City and County of San Francisco," approved March 24th, 1876, to-wit:

First. Commencing at a point on the westerly line of Dupont street distant twenty-two (22) feet southerly from the southwesterly corner of Bush and Dupont streets; then running southerly along said line of Dupont street twenty (20) feet; thence at right angles westerly fifty-
684 eight (58) feet to the point of commencement.

Second. Commencing at a point on the westerly line of Dupont street distant forty-two (42) feet southerly from the southwesterly corner of Dupont and Bush streets; thence running southerly along said line of Dupont street forty-two (42) feet; thence at right angles westerly fifty-eight (58) feet; thence at right angles southerly twenty-one (21) feet to Harlan Place; thence at right angles westerly along the northerly line of Harlan Place seventy-nine (79) feet and six (6) inches; thence at right angles northerly sixty-three (63) feet; and thence at right angles easterly one hundred thirty-seven

685 (137) feet and six (6) inches to the place of commencement.

Fourth. Commencing at the northwesterly corner of Harlan Place and Dupont street; thence running northerly along the westerly line of Dupont street twenty-one (21) feet; thence at right angles westerly fifty-eight (58) feet; thence at right angles southerly twenty-one (21) feet to the northerly line of Harlan Place; and thence at right angles easterly along said line of Harlan Place fifty-eight (58) feet to the point of commencement.

Fifth. Commencing on the northwesterly corner of Sutter and Dupont streets; thence running northerly
686 along the westerly line of Dupont street forty (40) feet; thence at right angles westerly sixty (60) feet; thence at right angles southerly forty (40) feet to Sutter street; and thence at right angles easterly along the northerly line of Sutter street to the point of commencement.

That the report of the said Board of Dupont Street Commissioners, as required and contemplated by said Act of the said Legislature, has been completed, and is now left at the office of said Board in said city, daily, for the free inspection of all parties interested as required by said Act, and that said report was completed, and so
687 left for inspection on the 23d day of September, 1876, and not before.

That said Board has awarded, determined and set down on said lots respectively, as delineated on their map and diagrams of the same, the amount of damages to the buildings respectively on the portion of said lots taken for said street, and the portions thereof not taken, to-wit:

Damages to building on Lot No.					1,	above	described	$1,302
"	"	"	"	"	2,	"	"	1,321
"	"	"	"	"	3,	"	"	2,438
"	"	"	"	"	4,	"	"	1,134
"	"	"	"	"	5,	"	"	2,069
								$8,264

688 And your petitioner objects to the above award and determination of damages, and to each and every one of them, and says, the same are incorrect, and the said Board erred in making said awards.

That the actual damages to said buildings will be, and are, as follows, to-wit:

Damages to building on Lot No. 1	$1,950
" " " " " 2	1,625
" " " " " 3	3,089
" " " " " 4	1,652
" " " " " 5	4,975
	13,291

689 And your petition further shows to the Court, that said Board have determined the benefits to, and assessed the portions of the above lots not taken for said street, in the following amounts, to-wit:

Lot No. 1	$3,392
" " 2	3,307
" " 3	16,349
" " 4	3,562
" " 5	8,856
	$35,466

690 To which assessments, and each and every one of them, your petitioner objects, and says said assessments, and each of them, are largely in excess of the real benefits to said lots, and that said Board erred in making the same.

That the actual benefits to the portion of each and every lot above described, not taken for said street, are as follows, and no more, to-wit:

Lot No. 1	$2,000
" " 2	2,000
" " 3	8,000
" " 4	2,500
" " 5	5,941
	$20,441

691 And your petitioner further shows that his said land is situated in the last block, and northern end of said widened street, and that in effect said lots will set back thirty feet from the front of the street north of said lots.

That the depth and width of the respective lots after widening said street, will be as follows, to-wit:

No. 1.	28 feet deep by	20 feet wide.	
No. 2.	28 " " "	21 " "	
No. 3.	$107\frac{6}{12}$ " " "	42 " "	in front.
		63 " "	" rear.
No. 4.	28 " " "	21 " "	
No. 5.	30 " " "	40 " "	

692 That the damages awarded and assessments made, as aforesaid, should be corrected, and made to conform to the real damages to said buildings, and actual benefits to said lots.

Your petitioner further shows, that while the land south of Harlan Place, and between said last named street and Sutter street, is benefited to a much larger amount than the land of your petitioner, the same is assessed less for benefits and awarded damages in a greater amount, to-wit: the 126 feet front by $137\frac{1}{2}$ feet deep, between Bush street and Harlan Place, owned by your petitioner, is assessed for benefits in the sum of $38,985; while the lot
693 between Harlan Place and Sutter street, same size, is assessed only for $36,644.

And the first named piece of land is awarded for damages only $59,110, while the other is awarded $63,239; thus showing that your petitioner's land is assessed $2,341 more than the last named lot of land, and that he is awarded damages in a less sum by $4,129.

Wherefore your petitioner prays for an order of this Court setting a day for the hearing of this petition, and requiring the said Board of Commissioners to file with this Court the report of said Board, and the maps, plans, diagrams, documents, and data used by said Board in

694 preparing their report, and awarding damages and assessing benefits, etc.; and that upon said hearing said Commissioners be required to alter and modify said report so as to conform to the statements of this petition, and so as to allow your petitioner the amount of damages to his buildings herein set forth, and so that the assessments for benefits shall be reduced to the actual benefits as above stated; and for such other and further relief and order as shall be just and equitable in the premises.

TILDEN & WILSON,
Attys. for Petitioner."

695

Plaintiff also read in evidence the three orders made by the County Court on that date, which are as follows:

" James Phelan having presented to the Court and " filed his petition setting forth his interest in the pro- " ceedings had before the Board of Dupont Street Com- " missioners, established by the Act of the Legislature of " the State, entitled " An Act to authorize the widening " of Dupont street, in the City and County of San Fran- " cisco," approved March 23d, 1876, and his objections " thereto; and having applied by said petition for an or- " der on said Board requiring it to file with said Court
696 " the report of said Board, and such other documents and " data as are pertinent thereto in the custody of said " Board, and which were used by it in preparing said re- " port, and that upon the filing of the same this Court " will make such other order in the premises as may be " just.

" It is now, upon motion of Messrs. Jarboe & Harri- " son, attorneys for said petitioner, ordered that said pe- " tition be heard before this Court on Friday, the 27th " day of October, A. D. 1876, at 2 o'clock in the afternoon " of that day; and this Court hereby sets the same down " for a hearing before it at said day and hour."

697 "Upon reading and filing the petition of Thomas H. " Blythe, setting forth his interest in several pieces or " parcels of land lying southerly from Bush street, and " situate within the district defined and designated in " Section 3 of an Act entitled, 'An Act to authorize the " widening of Dupont Street, in the City of San Fran- " cisco,' passed March 23d, 1876, and also setting forth " his interest in the proceedings before the Board of " Commissioners, appointed under and by said Act, and " also his objections thereto.

" It is ordered that said Board file with this Court its " report of proceedings under said Act, and all such doc-
698 " uments and data as may be pertinent thereto, which are " in the custody of said Board, and have been used by it " in making said report; and it is further ordered, that " Friday, the 27th day of October, 1876, at 2 o'clock P. M., " at the Court-room of this Court, be fixed as the day for " hearing the matter alleged in said petition."

" Upon reading and filing the petition of David Hun- " ter, praying for an order of this Court, setting a day for " the hearing of said petition, and requiring the Board of " Dupont Street Commissioners to file with this Court a " report of said Board, and good cause appearing by said
699 " petition; therefore, it is hereby ordered that Friday, the " 27th day of October, 1876, at 2 o'clock P. M. of said day, " at the Court-room of this Court, at the City Hall in the " City of San Francisco, be and the same is fixed and set " as the time and place for the hearing of said petition; " and it is further ordered that said Board be, and it is " hereby required to file with this Court, on or before " the time set for the hearing of said petition, as " aforesaid, the report of said Board, with the maps, " plans, diagrams and data used by said Board in pre- " paring said report, and that a copy of this order be " served upon one of the members of said Board."

Plaintiff next offered in evidence the petition of Maria

700 Maurin, filed in the County Court, dated October 23d, 1876.

"To the Honorable, the County Court, in and for the City and County of San Francisco.

Your petitioner respectfully shows, that on or about the 23d day of September, A. D. 1876, the Board of Commissioners for widening Dupont street, made their report, and on or about the 25th day of September, 1876, gave notice thereof.

That your petitioner is interested in a certain piece of land, and the improvements thereon, at No. 207 Dupont street, and in the district to be taken for the widening of
701 said street.

That said interest is a leasehold interest, viz:

For a term of three years, from the first day of January, 1876, to the 1st day of January, 1879, at the monthly rent of $75 per month, payable monthly in advance and for said premises No. 207 Dupont street.

That the said term is worth to said petitioner, the sum of $4,500 in gold coin.

That on or about the 28th day of July last, the said petitioner filed with the said Commissioners the lease of said premises, together with a claim for damages, and
702 prayed that the same be allowed by said Board of Commissioners, which said Board, notwithstanding said claim of your petitioner, have proceeded and made their report, wholly rejecting your petitioner's claim, and allowing her nothing for the damages so as aforesaid claimed of them.

Wherefore, your petitioner excepts to the report of said Board of Commissioners, because of the great injustice done your said petitioner by the said Board in rejecting her said claim, and allowing her nothing for the damages so about to be done to her, in taking her leasehold estate.

And your petitioner prays that this Honorable Court

703 will make an order requiring said Board of Commissioners to file with said Court their report, and such other documents or data as may be pertinent thereto, now in the custody of the said Board, and used by it in preparing said report, and that this Honorable Court will grant your petitioner such relief in the premises, and allow her such damages, as shall seem proper and just.

MARIA MAURIN.

BAKER & VERDENAL,

Attys. for Petitioner.

OCT., 1876."

704 And also the Minute Order of the County Court, made on the 25th of October, 1876, which is as follows:

"IN THE MATTER OF THE
WIDENING OF
DUPONT STREET.

On reading and filing the petition of Maria Maurin herein, it is ordered that said petition be set down for hearing on the 27th of October, 1876, A. D., at 2 o'clock P. M., or so soon thereafter as counsel can be heard, at the Court room of said Court; and it is further ordered that this order be entered *nunc pro tunc* as of the 23d
705 day of October, inst."

Plaintiff next offered the order as to Julia Aubonnett in evidence:

"On reading and filing the petition of Julia Aubonnett herein, it is ordered that said petition be set down for hearing on the 27th day of October, A. D. 1876, at 2 o'clock P. M., or as soon as counsel can be heard, at the Court room of said Court; and it is further ordered that this order be entered *nunc pro tunc* as of the 23d day of October, inst."

Plaintiff next offered in evidence the petition of P. Marsicano, filed on the 25th of October, 1876.

706 " *In the County Court of the City and County of San Francisco, State of California:*

IN RE
THE WIDENING OF DUPONT
STREET.

The Petition of Patrizio Marsicano shows to this Hon. Court: That he is and has been for more than two years last past the owner and in possession of that certain piece or parcel of land situate in said City and County, com-
707 mencing at a point formed by the intersection of the westerly line of Dupont street with the northerly line of Geary street, running thence westerly along said line of Geary street seventy feet, thence at right angles easterly parallel with Geary street seventy feet to the westerly line of Dupont street, and thence southerly along the westerly line of Dupont street fifty feet to the place of beginning.

That the said lot of land has been assessed for supposed benefits in the above matter by the report of the Commissioners acting therein and on that behalf, in the sum of fifteen thousand eight hundred and fifty-four dol-
708 lars.

That the sum of thirty-seven thousand and thirty-three dollars has been allowed by said Commissioners as damages for injury done to the said land by the said widening of Dupont street, and the sum of four thousand eight hundred and twenty-four dollars has been allowed for injuries done to the improvements on the said land by the said widening.

That your petitioner is aggrieved by the action of the said Board and its determination as shown in the said report, and his objections are the following, to-wit:

First. The said amount assessed for supposed benefits

709 allowed, be ten thousand dollars, instead of fifteen thousand eight hundred and forty-four dollars.

Second. The sum of thirty-seven thousand and thirty-three dollars, allowed by said Commissioners as aforesaid, should be forty-five thousand dollars.

Third. The sum of four thousand eight hundred and twenty-four dollars, allowed as aforesaid, should be seventy-five hundred dollars.

Wherefore your petitioner prays for an order on said Board of Commissioners, requiring it to file with said Court its said report, and such other documents and *data* as may be pertinent thereto, in the custody of said Board
710 and used by it in preparing said report; and further, that the said Court shall order and direct the said report to be modified and altered so as to remedy the objections above set forth, and for such other and further relief as may be just.

ROCHE AND ROBINSON,
Attys. for Petitioner."

And the minute order made by the County Court, which is as follows:

"IN THE MATTER
711 OF THE
WIDENING OF DUPONT STREET.

On reading and filing the petition of P. Marsicano for a modification of the report of the Board of Commissioners herein, it is hereby ordered that said petition be set down for hearing on the 27th day of October, at 2 o'clock P. M., at the Court room of this Court. It is further ordered that this order be entered *nunc pro tunc* as of October 26th, 1876."

Plaintiff next offered in evidence the petition of

712 Theo. Meetz and B. Simon, filed on the 25th of October, 1876, which is as follows:

"*In the County Court of the City and County of San Francisco, State of California:*

"IN THE MATTER OF THE WIDENING OF DUPONT STREET

To the Honorable the County Court of the City and County of San Francisco:

713 The application and petition of Theodor Meetz and B. Simon, respectfully shows that they are interested in the proceedings had before the Board of Dupont Street Commissioners, and are and were the owners of the parcel of land commencing at the point formed by the intersection of the easterly line of Dupont street, with the southerly line of Post street; running thence southerly along the said easterly line of Dupont street 60 feet; thence at right angles easterly 60 feet; thence at right angles northerly 60 feet; thence at right angles westerly along said southerly line of Post street 60 feet, to the point of commencement.

714 Your petitioners show, as their objections to the report of said Commissioners, and as a reason why the same should not be confirmed by this Court:

1st. The Board of Supervisors of the City and County of San Francisco have never, by resolution or order, expressed in any form, that it was their judgment that it would be expedient that Dupont street be widened in accordance with and in the mode prescribed by the Act of the Legislature, approved March 23d, 1876, entitled, "An Act to authorize the widening of Dupont street in the City and County of San Francisco."

2d. That said Board of Dupont Street Commissioners have never published the notice provided for by Sec-

715 tion 6 of said Act. The only notice published by said Commissioners was before the resolution referred to in the 21st Section of said Act, had been passed by the said Board of Supervisors, and the resolution by said Commissioners, adopted April 14th, 1876, and under which the Secretary of said Board subsequently caused a notice to be published in the "Daily Evening Bulletin," and the "Daily Alta California," did not specify any papers in which the said notice should not be published, nor did the said Commissioners give the said Secretary any authority to publish said notice in said papers. The publication by him in said papers was without authority, and
716 insufficient to comply with the requirements of Section 6 of said Act.

3d. The said report shows that the value of the land taken, and the damages to improvements thereon or adjacent thereto, and injured thereby, and all other expenses whatsoever incidental to the taking and widening of said street are as follows:

Value of real estate taken	$639,915
Damages to improvements	126,501
Actual and contingent expenses Com	131,691

That said Board, at its meeting on the 23d day of
717 September, 1876, adopted as the report of actual expenses, actual and contingent to be incurred in the matter of widening Dupont street from Bush to Market street, viz:

Various items amounting in the aggregate to the sum of $131,691.

That one of the items specified therein, and constituting a part of said estimated amount of $131,691, is the following, viz: estimated incidental expenses to accrue up to, and until the close of the duties of the said Board, advertising, removing improvements, expenses of any litigation that may arise, drawing deeds, damages, if any, from change of grade, and any other item of damage and ex-

718 pense that may be incurred, and not set forth in this report, $98,935.71.

The valuation of the benefits to the land within the district, was adopted by the Board before their estimate of expenses had been agreed upon, viz: on September 16, 1876, and this item is evidently a forced balance, adopted for the purpose of making the cost equal to the benefits.

Said item of estimated expenses is grossly disproportionate to any possible expenses that may be incurred under the provision of the Act, and is illegally included in said report, and is without any authority therefor in said Act.

719 All the expenses that may accrue, or be legally included, are included in other items in the resolution adopted on said date.

By the 2d Section of said Act, the cost of widening said street is defined to be the value of the land taken, the damages to the improvements thereon, and all expenses whatever incident to the widening of said street.

By the Act itself, the expense of removing the improvements is to be borne by the owners thereof, or the purchasers under a sale of the same; the parties making the deed are to prepare and tender the same to the Board.

720 The expense of grading the street, is to be assessed upon the adjacent property, in the same manner as if the said street remained of its original width, and there is no fact presented, and nothing shown, from which it can be inferred that any litigation will arise, or that there are, or will be any damages from any change of grade.

Your petitioners therefore make the objection, that nine per cent. and upwards of the entire cost of the proposed improvements for conjectured expenses that may never arise, and which are not shown to have any foundation in fact, or to be based upon any fact or principal, is greatly in excess of what should be allowed, and ought not to be as-

721 sessed upon the property which is by the Act compelled to bear the expense of widening said street.

Only fixed and definite expenses can be allowed under said Act as a proper portion of the cost of widening said street, and the expense should be specifically set forth in the report, so that persons interested may know for what their land is taxed.

4th. The assessment or appraisement of benefits against the aforesaid lot of land belonging to your petitioners, as shown by the said report, is unjust, relatively unequal to the amounts assessed to other lots, and disproportionate to the benefits which are stated in said report
722 as accruing to other lots of land within the district designated by said Act.

(1) An inspection of said report shows that the lot above described is assessed as more highly benefited by said improvement than other land in exactly the same relative location, whereas land in exactly the same relative location should be assessed at exactly the same benefit.

(2) The land on the western side of Dupont street will be more benefited by said improvement than the land on the eastern side of said street.

723 This proposition was acted upon by said Board in making its assessment, inasmuch as they have assessed the land along said street at a higher rate upon the western than upon the eastern side in each block, except in the block between Geary and Post streets.

In those blocks the Board has assessed the eastern side at a higher rate than it has the western side; that said assessment is disproportionate and unjust, and an injury is thereby wrought against your petitioners to the extent of $6,227.46, and the aforesaid lot of land is assessed at a higher rate for benefits than would accrue to said lot relatively to the benefits accruing to other lots in said district.

724 (3) The principle upon which said assessment has been made is that the relative benefits to the land within said district increases as the land lies further south from Bush street, and that the rate of increase is greater as Market street is approached; but this principle has been violated in the assessment of the lot of your petitioners, there being lots of the same size further south assessed at a less value.

(4) The lot of your petitioners is assessed at $20,758, which is thirty per cent. too high relatively to other lots in the same district.

725 (5) Your petitioners object to the increased assessment on their property by reason of its being a corner lot, and insist that there is no reason why a corner lot should be assessed more than an interior lot.

Your petitioners therefore pray for an order on said Board of Dupont Street Commissioners, requiring it to file with this Court a true report of the proceedings of said Board, and all documents and data pertaining thereto, in the custody of said Board, and which were used by it in preparing said report, and that upon filing the same, this Court will make such further order in the premises as may be just.

H. H. HAIGHT,

726 *Att'y for Petitioner.*"

And the minute of the Court made on that day:

" On reading and filing the petition of Theodore Meetz and B. Simon, herein, it is ordered that said petition be set down for hearing on the 3d day of November, 1876, at 2 o'clock P. M., or as soon thereafter as counsel can be heard at the Court room of this Court. And it is further ordered, that this order be indorsed *nunc pro tunc* as of the 25th day of October, 1876.

And, it appearing to the Court that the Board of Dupont Street Commissioners having, in obedience to the order made herein, on the 20th of October, A. D.

727 1876, on the petition of Thomas H. Blythe, filed with this Court its report of proceedings in the matter of widening Dupont street, and all such documents or data as may be pertinent thereto which are in its custody; it is ordered that said Commission and its attorney have leave to withdraw said report and documents from the Clerk, for inspection, upon leaving with said Clerk its, or his order therefor, until the further order of the Court. And now, on this day, this matter coming on regularly to be heard, the parties appearing in Court by their attorneys, to wit, William M. Pierson, Esq., on the part of the Commissioners, and Messrs. Harrison, Hent, Tilden
728 and Baker, on the part of the petitioners; whereupon, on motion, and by consent of the parties, it is ordered that the hearing in said matter be continued until Tuesday, October 31st, 1876, at 10 o'clock A. M."

Plaintiff next offered in evidence the minute order of the 31st of October, 1876:

" In the matter of widening Dupont street.

On motion of Mr. Pierson, attorney for the Commissioners, it is ordered the hearing in said matter be continued until Friday, November 10th, 1876, at 10 o'clock A. M."

729 Plaintiff next offered in evidence the minute order of November 10th, 1876, which is as follows:

" *In re Opening of Dupont street.* On motion, and by consent, it is ordered that the hearing in said matter be and is hereby continued until Friday, the 17th inst., at 10 o'clock A. M."

Plaintiff next offered in evidence the minute order of Friday, November 17th, 1876, which is as follows:

" In the matter of the widening of Dupont street.

On motion of Mr. Pierson, attorney for the Commissioners, counsel for objectors consenting, it is ordered that the hearing in the said matter be continued until Friday, 24th inst., at 10 o'clock A. M."

731 Plaintiff next offered in evidence the minute order of November 24th:

"In the matter of widening Dupont street.

On this day this matter came on regularly to be heard, Mr. Pierson appearing on behalf of the Commissioners, and Messrs. Haight, Hent, Fifield, Dameron, and others, on the part of the objectors. Whereupon, in open Court, on motion of Mr. Hent, attorney for Wm. Sharp, one of the objectors herein, leave is given to withdraw the objections of the said Sharp, which is done accordingly.

"On motion of Mr. Fifield, and on reading the petition of George Dickson herein, it is ordered that said petition
731 be set down for hearing on the 24th day of November, 1876, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, at the Court room of said Court; and it is further ordered, that this order be entered *nunc pro tunc* as of the 24th day of October, 1876.

"On motion of Mr. Dameron, and on reading the petition of L. Cariveaux herein, it is ordered that said petition be set down for hearing on the 1st day of December, at 10 o'clock, A. M., or as soon as counsel can be heard, at the Court room of said Court; and it is further ordered, this order be entered *nunc pro tunc* as of October 21st, 1876.

732 "On motion of Mr. Pierson, attorney for the Commissioners, the attorneys for the objectors consenting, it is ordered that the hearing in said matter be continued until Friday, December 1st, 1876, at ten o'clock, A. M."

Plaintiff next offered in evidence the minute order of the Court, December 1st, 1876, which is as follows:

"In the matter of widening of Dupont street.

On motion and by consent of all the parties, it is ordered that the hearing in this matter be continued until Friday, December 8th, 1876, at 10 o'clock, A. M.

733 Plaintiff stated that there was nothing done on the 8th—there was no order continuing this matter made on the 8th.

Plaintiff then next offered in evidence the minute order of the Court, December 15th, 1876, which is as follows:

"In the matter of the widening of Dupont street.

On motion and by consent, the hearing of this matter is continued until, and specially set for Monday, December 18th, 1876, at 2 o'clock P. M."

Plaintiff next offered in evidence the minute order of
734 the Court of December 18th, 1876, which is as follows:

"In the matter of widening of Dupont street.

The petition of Catherine Fogarty filed herein on the 24th day of October, 1876, coming on to be heard on this day; on motion of Wm. M. Pierson, Esq., attorney for the Board of Dupont Street Commissioners, T. F. Batchelder, Esq., attorney for said Catherine Fogarty, consenting thereto, it is ordered that the said petition be, and the same is hereby dismissed; and it appearing to the Court from the petition of Theodore Meetz and B. Simon that the report of said Commissioners should be modified, on motion of H. H. Haight, Esq., attorney for
735 said petitioners, the Board of Dupont Street Commissioners consenting thereto; it is ordered, that said report be and the same is hereby referred back to said Board of Dupont Street Commissioners; and that said Board be and it is hereby directed to alter and modify the same in the manner following, to-wit: In the volume of said report known as the "Report benefits Widening Dupont Street," at page 8, block 97, at subdivision 17, in the column headed "Enhanced value or amount of benefits assessed," there shall be stricken therefrom the figures "$20,758," and in lieu thereof there shall be inserted the figures "$15,758," and on motion of Wm. M. Pierson,

736 Esq., attorney for said Board, H. H. Haight, Esq., attorney for said petitioners, assenting thereto, it is further ordered that, except as above granted, all and singular, each and every claim, objection and prayer in said petition contained, be and the same are hereby overruled and denied.

And it further appearing to the Court from the petition of Wm. Sharp, that the report of said Commissioners should be modified, on motion of R. W. Hent, Esq., attorney for said petitioner, the Board of Dupont Street Commissioners assenting thereto; it is ordered that the said report be, and the same is hereby referred back to
737 said Board of Dupont Street Commissioners, and that said Board be, and it is hereby directed to alter and modify the same in the manner following, to-wit: In the volume of said report known as the "Report Benefits Widening Dupont Street," at page 11, in block 96, at subdivision 4, in the column headed "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$2,288," and in lieu thereof there shall be inserted the figures "$2,038," and on motion of Wm. M. Pierson, Esq., attorney for said Board, R. W. Hent, Esq., attorney for said petitioner, assenting thereto; it is further ordered, that except as above granted, all
738 and singular, each and every claim, objection and prayer in said petition contained, be and the same are hereby overruled and denied.

And it appearing to the Court from the petition of Geo. W. Osborn that the report of said Commissioners should be modified, on motion of T. B. Bishop, Esq., attorney of said petitioner, the Board of Dupont Street Commissioners assenting thereto; it is ordered that the said report be, and the same is hereby referred back to said Board of Dupont Street Commissioners, and that said Board be and it is hereby directed to alter and modify the same in the manner following, to-wit: In the

739 volume of said report known as the "Report Benefits Widening Dupont Street," at page 12, at block 96, at subdivision 9, in the column headed "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$5,617," and in lieu thereof there shall be inserted the figures "$4,617;" also in same volume, at page 13, in block 96, at subdivision 10, in the column headed "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$11,827," and in lieu thereof there shall be inserted the figures "$7,827," and on motion of W. M. Pierson, Esq., attorney for said Board, T. B. Bishop,
740 Esq., attorney for said petitioner, assenting thereto; it is further ordered that, except as above granted, all and singular, each and every claim, objection and prayer in said petition contained, be and the same are hereby overruled and denied.

And it appearing to the Court from the petition of Geo. Dickson that the report of said Commissioners should be modified, on motion of W. H. Fifield, Esq., attorney for said petitioner, the Board of Dupont Street Commissioners assenting thereto; it is ordered that the said report be, and the same is hereby referred back to
741 said Board of Dupont Street Commissioners, and that said Board be and is hereby directed to alter and modify the same in the manner following, to-wit: In the volume of said report known as the "Report of Damages Widening Dupont Street," at page 24, in block 119, at subdivision one, in the column headed "Cash Value of Lands Taken," there shall be stricken therefrom the figures "$16,000," and in lieu thereof shall be inserted the figures "$20,000;" and on Motion of W. M. Pierson, Esq., attorney, W. H. Fifield, attorney for said petitioner, assenting thereto; it is further ordered that, except as above granted, all and singular, each and every claim,

742 objection and prayer in said petition contained, be and the same are hereby overruled and denied.

And it appearing to the Court from the petition of Thomas H. Blythe that the report of said Commissioners should be modified, on motion of H. H. Haight, Esq., attorney for said petitioner, the Board of Dupont Street Commissioners assenting thereto; it is ordered that the said report be, and the same is hereby referred back to said Board of Dupont Street Commissioners, and that said Board be, and it is hereby directed to alter and modify the same in the manner following, to-wit: In
743 the volume of said report known as the "Report Benefits Widening Dupont Street," at page 1, in block 98, at subdivision 1, in the column headed, "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$48,240," and in lieu thereof there shall be inserted the figures "$13,500;" also, in the same volume, page 1, in block 98, at subdivision 2, in the column headed, "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$43,873," and in lieu thereof there shall be inserted the figures "$23,187;" also, in the same volume at page 2, in block 98, at subdivision 4, in the column headed,
744 "Enhanced Value or Amounts of Benefits Assessed," there shall be stricken therefrom the figures "$2,424," and in lieu thereof there shall be inserted the figures "$2,264."

Also in same volume at page 2, in block 98, at subdivision 6, in the column headed "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$522," and in lieu thereof there shall be inserted the figures "$602;" also in same volume at page 3, in block 98, at subdivision 7, in the column headed, "Enhanced Value or Amount of Benefits Assessed," there shall be stricken

745 therefrom the figures "$2,249," and in lieu thereof, there shall be inserted the figures "$100."

And on motion of W. M. Pierson, Esq., attorney for said Board, H. H. Haight, Esq., attorney for said petitioner assenting thereto; it is further ordered that except as above granted, all and singular, each and every claim, objection and prayer in said petition contained, be and the same are hereby overruled and denied.

And it appearing to the Court, from the petition of P. Marsicano, that the report of said Commissioners should be modified, on motion of J. J. Roche, Esq., attorney for said petitioner, the Board of Dupont Street Commissioners
746 assenting thereto; it is ordered that the said report be, and the same is hereby referred back to said Board of Dupont Street Commissioners, and that said Board be, and it is hereby directed, to alter and modify the same in manner following, to-wit: In the volume of said report, known as the "Report Benefits Widening Dupont Street," at page 47, in Block No. 120, at Subdivision 25, in the column headed, "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$15,844," and in lieu thereof, there shall be inserted the figures "$11,844."

747 And on motion of W. M. Pierson, Esq., attorney for said Board, J. J. Roche, Esq., attorney for said petitioner assenting thereto; it is further ordered that except as above granted, all and singular, each and every claim, objection and prayer in said petition contained, be and the same are hereby overruled and denied.

And it appearing to the Court from the petition of David Hunter, that the report of the Commissioners should be modified, on motion of H. J. Tilden, Esq., attorney for said petitioner, the Board of Dupont Street Commissioners assenting thereto; it is ordered that the said report be, and the same is hereby referred back to the said Board of Dupont Street Commissioners, and that

748 said Board be, and it is hereby directed to alter and modify the same in manner following, to-wit: in the volume of said report, known as the "Report Benefits Widening Dupont Street," at page 25, in Block 118, at Subdivision 14, in the column headed, "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$16,349," and in lieu thereof, there shall be inserted the figures "$11,349." Also in same volume, at page 26, in Block 118, at Subdivision 18, in the column headed, "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$8,856," and in lieu thereof, there shall be inserted the
749 figures "$5,856." Also in the volume of said report, known as the "cash value of improvements taken or damaged," at page 29, in Block 118, at Subdivision 14, in the column headed, "Cash value of improvements taken or damaged," there shall be stricken therefrom the figures "$2,438," and in lieu thereof, there shall be added the figures "$5,174," and on motion W. M. Pierson, Esq., attorney of said Board, H. J. Tilden, Esq., attorney for said petitioner assenting thereto; it is further ordered that, except as above granted, all and singular, each and every claim, objection and prayer in said
750 petition contained, be and the same are hereby overruled and denied.

And it appearing to the Court from the petition of James Phelan, that the report of said Commissioners should be modified, on motion of Ralph C. Harrison, Esq., attorney for said petitioner, the Board of Dupont Street Commissioners assenting thereto; it is ordered that the said report be, and the same is hereby referred back to said Board of Dupont Street Commissioners, and that said Board be, and it is hereby directed to alter and modify the same in manner following, to-wit: In the volume of said report known as the "Report Benefits Widening Dupont Street," at page 55, in block 122, at subdivision

751 1, in the column headed "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$41,560," and in lieu thereof there shall be inserted the figures "$31,560;" also in the same volume, at page 13, in block 96, at subdivision 11, in the column headed "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$51,929," and in lieu thereof there shall be inserted the figures "42,867;" also in the same volume at page 13, in block 96, at subdivision 12, in the column headed "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$4,938," and in
752 lieu thereof there shall be inserted the figures "$4,000;" also in the volume of said report known as the "Report Damages Widening Dupont Street," at page 1, in block 122, at subdivision 1, in the column headed "Cash Value of Lands Taken," there shall be stricken therefrom the figures "$15,000," and in lieu thereof there shall be inserted the figures "$25,000." And on motion of W. M. Pierson, Esq., attorney for said Board, R. C. Harrison, Esq., attorney for said petitioner, assenting thereto; it is further ordered that, except as above granted, all and singular, each and every claim, objection and prayer in
753 said petition contained, be and the same are hereby overruled and denied; and on motion of Wm. M. Pierson, Esq., attorney for said Board of Dupont Street Commissioners, the further hearing of this matter is continued until to-morrow, December 19th, 1876, at 10 o'clock A. M."

Plaintiff next offered in evidence the minutes of the Court of December, 19th, 1876, which are as follows:

"In the matter of the widening of Dupont street.

It appearing to the Court from the petition of L. Carriveaux that the report of the Board of Commissioners herein should be modified, on motion of J. P. Dameron, Esq., attorney for said petitioner, the Board of Dupont Street Commissioners assenting thereto;

754 It is ordered that the said report be, and the same is hereby referred back to said Board of Dupont Street Commissioners, and that said Board be, and it is hereby directed to alter and modify the same in manner following, to wit: In the volume of said report known as the "Report Benefits Widening Dupont Street," at page 49, in block No. 121, at subdivision 6, in the column headed "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures "$4,653," and in lieu thereof there shall be inserted the figures "$3,400;" and on motion of W. M. Pierson, Esq., attorney for said Board, J. P. Dameron, Esq., attorney for
755 said petitioner, assenting thereto; it is further ordered that, except as above granted, all and singular, each and every claim, objection and prayer in said petition contained, be and the same are hereby overruled and denied.

On motion of Wm. M. Pierson, attorney for said Board of Dupont Street Commissioners, the further hearing of the matter is continued until Friday, December 22nd, 1876, at 10 o'clock A. M.

Plaintiff then offered in evidence the order of the Court of December 20th, 1876, which is as follows:

756 "In the matter of the widening of Dupont street by the Board of Dupont Street Commissioners.

In this matter, it appearing to the Court, from the petition of L. Cariveaux, that the report of the Commissioners herein should be modified, on motion of J. P. Dameron, Esq., attorney for said petitioner, the Board of Dupont Street Commissioners assenting thereto; it is ordered that the said report be and the same is hereby referred back to said Board of Dupont Street Commissioners, and that said Board be, and it is hereby directed to alter and modify the same in the manner following, to wit: In the volume of said report known as the "Report Benefits

757 Widening Dupont Street," at page 49, in Block No. 121, at subdivision 6, in the column headed " Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures " $4,653," and in lieu thereof there shall be inserted the figures " $3,400." And on motion of Wm. M. Pierson, Esq., attorney for said Board, J. P. Dameron, Esq., attorney for said petitioner, assenting thereto; it is further ordered that, except as above granted, all and singular each and every claim, objection and prayer in said petition contained, be and the same are hereby overruled and denied.

759 And on motion of Baker and Verdenal, attorneys for Maria Maurin, a petitioner herein, the Board of Dupont Street Commissioners assenting thereto; it is ordered that the said report be, and the same is hereby referred back to said Board of Dupont Street Commissioners, and that said Board be, and it is hereby directed to alter and modify the same in manner following, to wit: In the volume of said report known as " Report Damages Widening Dupont Street," on page 16, block No. 119, at subdivision 20, under the heading of column " Names of Owners, etc.," there shall be inserted the name of " Maria Maurin, Lessee," and under the heading of column
759 " Description of Property," there shall be inserted the words " Leasehold, unexpired term of lease, dated January 1st, 1876, for three years;" and under the heading of the column " Cash Value of Lands Taken," there shall be inserted, opposite the entry, " Leasehold," etc., the figures " $250;" and the column of " Total Amounts " shall be altered so as to show the correct total. And on motion of Wm. M. Pierson, Esq., attorney for said Board, Baker and Verdenal, attorneys for said petitioner, assenting thereto; it is further ordered that, except as above granted, all and singular, each and every

760 claim, objection and prayer in said petition contained, be and the same are hereby overruled and denied.

The petition of Julia Aubonnett and N. Cousin, filed herein on the——day of———, 1876, coming on to be heard on this day, on motion of Wm. M. Pierson, Esq., attorney for the Board of Dupont Street Commissioners, Messrs. Baker and Mr. Verdenal appearing for Julia Aubonnett, and————————————appearing for N. Cousin, and consenting thereto; it is ordered that said petitions be and the same are hereby dismissed."

Plaintiff next read in evidence from the minutes of the
761 said County Court, of the 20th of December, 1876, the following order, made on said day:

"Whereas, by a certain Act of the Legislature of the State of California, entitled, "An Act to authorize the widening of Dupont street, in the City of San Francisco," approved March 23d, 1876, it was provided that the width of the street known as Dupont street, in the City and County of San Francisco, should, subject to the provisions of said Act, be increased, so that the said street should be of the uniform width of seventy-four (74) feet, measuring westerly from the present easterly line thereof, from the northerly line of Market street to the southerly line of
762 Filbert street, and that sufficient land should be, and the same was thereby dedicated and taken for an open and public street of said width, and when paid for, as provided in said Act, the title thereto should vest in said city and county, for such purpose, forever, as the title of other public streets in said city and county then was vested.

And whereas, it was further provided in said Act, that all the costs and expenses of every kind or character, for the widening of said street, should be assessed against the following described district in said city and county, that is to say:

763 *First.* Beginning at a point on the south line of Filbert street, equidistant between Dupont and Kearny streets, and running thence southerly parallel with said easterly line of Dupont street to the northerly line of Market street; thence westerly on the northerly line of Market street to Dupont street; thence northerly on the easterly line of Dupont street to the southerly line of Filbert street; and thence easterly on the southerly line of Filbert street to the point of beginning, excepting such portions thereof as are dedicated and used for the purposes of streets, alleys or public squares.

Second. Beginning on the southerly line of Filbert
764 street at a point equidistant between Stockton street and the westerly line of Dupont street as it will be established when said street is widened; running thence southerly parallel with said westerly line of Dupont street as so established to the northerly line of Market street; thence easterly on said line of Market street to the said westerly line of Dupont street; thence northerly on said westerly line of Dupont street to Filbert street; and thence westerly on Filbert street to the point of beginning, except such portions as are dedicated and used for the purposes of streets, alleys or public squares. Provided, how-
765 ever, that in case the said streets should not be widened further north than Bush street, then the district aforesaid should be bounded on the north by the southerly line of Bush street, and on the south by the northerly line of Market street.

And, whereas, it was in said Act further provided that the Board of Supervisors of the City and County of San Francisco were authorized, if in the judgment of said Board it should be expedient, that Dupont street be widened in accordance with and in the mode prescribed by said Act, to express such judgment by resolution or order in such form as said Board might deem advisable, within sixty (60) days after the passage of said Act, and

766 in the event that said Board of Supervisors within said period of sixty days after the passage of said Act should fail to pass an order or adopt a resolution declaring it expedient to widen Dupont street under the provisions of said Act, no further proceeding should be had or taken under said Act for any purpose whatever; but if said Board should pass such resolution, then all proceedings thereafter should be taken under the provision of said Act. And, whereas, it is further provided in said Act that at any time within thirty days after the last publication of the notice specified in Section six (6) of said Act a majority in value according to the assessment roll
767 for the then fiscal year of the property owners between Market and Bush streets might protest in writing against the widening of Dupont street between said streets, and if such written protest, signed by such majority. should be filed with the Board of Commissioners named in said Act within said period, all the lots of land and property between Market and Bush streets should be entirely exempt and excluded from the operation of said Act; and said Act further provided, that within the same period a majority in value according to said assessment roll of the property owners fronting on Dupont street, between Bush
768 and Filbert streets, might petition in writing for the widening of Dupont street between said streets, and if such written petition signed by such majority should not be filed with said Board of Commissioners within said periods, all the lots of land and property between Bush and Filbert streets, should be entirely exempt and excluded from the operation of said Act.

And it appearing to the Court that on the 27th day of March, 1876, the Board of Supervisors of the City and County of San Francisco duly passed a certain resolution, numbered 8561, new series, declaring it necessary and expedient that Dupont street should be widened in accordance with and in the mode prescribed by said Act.

769 And it further appearing to the Court that on the 1st day of May, A. D. 1876, the said Board of Supervisors duly passed an order and resolution numbered 8693—new series—which order was duly approved on the 3d day of May, A. D. 1876, by A. J. Bryant, Mayor, and ex-officio President of said Board of Supervisors, wherein and whereby said Board declared it to be expedient that Dupont street, in the City and County of San Francisco, be widened under and in accordance with and to the extent and under the conditions prescribed in said Act.

And it further appearing to the Court that on the 3d day of April, A. D. 1876, the Board of Dupont Street
770 Commissioners provided for in said Act, consisting of A. J. Bryant, Mayor of the City and County of San Francisco, George F. Maynard, Auditor of said City and County, and Wm. P. Humphreys, Surveyor of said City and County, met as the Board of Dupont Street Commissioners, and organized by electing A. J. Bryant, Mayor, President of said Board.

And it appearing to the Court that on the 11th day of April, A. D. 1876, and on the 3d day of May, 1876, the said Board duly caused to be published the notice required and for the period required by section six of said Act.

771 And it further appearing to the Court that at no time did a majority or any of the property owners fronting on Dupont street, between Market and Bush streets, protest against the widening of Dupont street, between said streets, nor did a majority or any of the property owners fronting on Dupont street, between Bush and Filbert streets, at any time petition for the widening of said Dupont street, between said Bush and Filbert streets.

And whereas, the said above described district between Bush and Market streets was declared by said Act to be benefited by the widening of said Dupont street, and in truth would be and is benefited thereby; and it further

772 appearing to the Court that immediately after the organization of said Board, the said Board under and by virtue of the powers in it vested by said Act, proceeded to and did duly adopt certain surveys, maps, plans, diagrams and block books, now on file in this Court, and did ascertain and determine and separately state and set down in a written report a description of the several lots and subdivisions included in the land taken for the widening of said Dupont street, between Bush and Market streets, and the damage done to the property along the line of the said street, and the actual cash value of the buildings included in the land taken for said widening, and the dam-
773 ages for improvements taken and injured by said widening, as required by said Act, which written report was signed by each and all the members of said Board, under the official seal of said Board, and is designated as "Report Damages Widening Dupont Street," and was on the 27th day of October, A. D. 1876, duly filed in this Court, and the same is hereby referred to and made a part of this order.

And it further appearing to the Court that said Board did also ascertain and set down in a written report, a description of the several subdivisions or lots of land in-
774 cluded in the district aforesaid, between Bush and Market streets, and opposite to such description did set against each lot or subdivision the sum or amount in which, according to the judgment of said Board, the said lot had been benefited by reason of the widening of said street relatively to the benefits accruing to other lots of land within said district, which written report was signed by the members of said Board, under the official seal of said Board, and is designated as "Report Benefits Widening Dupont Street," and was on the 27th day of October, A. D. 1876, duly filed in this Court, and the same is hereby referred to and made a part of this order.

And it appearing to the Court that said Board did also

775 attach to said report two general maps, plans and diagrams showing the property taken and assessed for said improvement in lots and subdivisions, one block book, one book of description and appraisement of improvements, one book of maps, of land buildings, and the record book of said Board of Commissioners showing their official proceedings, all of which were duly filed in this Court on the day last aforesaid.

And it appearing to the Court that the gross amount of damages for the widening of said street between Bush and Market streets is "$914,991," and the amount allowed by said Board for attorney's fees, salary of Secretary, ex-
776 penses of experts, and all other amounts, as appears in said report, including such contingent expenses as may be necessarily incurred in closing the labors of said Board are fair, reasonable and just.

And it further appearing to the Court that the gross amount of benefits assessed against the property described in said Report of Benefits is "$796,837."

And it further appearing to the Court that said report sets forth and contains all the matters required by said Act.

And it further appearing to the Court that the said
777 Board duly completed said report on the 23d day of September, A. D. 1876, and as soon as the same was completed, left the same at the office of said Board daily, during ordinary business hours, for thirty (30) days, to-wit: from the 23d day of September, A. D. 1876, up to and including the 27th day of October, 1876, for the free inspection of all parties interested, and notice that the same was so open for inspection for such time and at such place, was duly published by said Board daily for twenty (20) days, in two daily newspapers, printed and published in said city and county, to-wit: from the 23d day of September, A. D. 1876, to the 17th day of October, A. D. 1876, both inclusive, as required by said Act.

778 And it further appearing to the Court that certain objections to the confirmation of said report were filed in the Court by certain of the parties interested, each and all of which petitions and objections have heretofore been withdrawn, dismissed, or disposed of by orders of this Court, and that all the orders of this Court heretofore made, directing said Board to modify said report, have been duly and fully complied with and obeyed by said Board, and that no objections now appear against the confirmation of said report.

And it further appearing to the Court that all the proceedings taken by said Board have been duly and legally
779 taken, and that each and all of the acts, matters and things provided by said Act to be done and performed by said Board in the premises, have, on the part of said Board, been duly and regularly done and performed in the form, at the times, and in the manner prescribed by said Act, and said Board having this day brought the said report, as so modified, into this Court, and duly filed a petition in this Court praying that said report, as so modified by this Court, be confirmed and approved.

Now, therefore, after hearing all the proofs in the said matter and on motion of Wm. Pierson, Esq., attorney for
780 said Board of Dupont Street Commissioners, and no one objecting thereto, and after full consideration thereof; it is ordered, adjudged and decreed that the said report of the said Board of Dupont Street Commissioners, in the matter of the widening of Dupont street, filed in this Court on the 27th day of October, A. D. 1876, as modified by said Board under the orders of this Court heretofore made herein, and as the same now exists on file herein, be and the same is hereby fully and in all respects approved and confirmed.

And it is further ordered, adjudged and decreed, that the lands described in the volume of said report, entitled "Report Damages Widening Dupont Street" be, and the

781 same are hereby taken and dedicated for an open and public street, and for the widening of said Dupont street, between Bush and Market streets, and that the title thereto, and every part thereof, as particularly described in said volume of said report, is vested in the City and County of Francisco for the purpose of said street forever, upon the payment in the manner prescribed by said Act, to the owners of each piece or parcel of such land, and to the owners of the improvements thereon, or upon the deposit or tender as prescribed by said Act, of the amounts fixed and determined in and by said volume of said report.

782 And it is further ordered, adjudged and decreed, that upon the payment of each, or either of said sums so fixed in said report, or upon the tender or deposit of such sum or sums, in the manner prescribed by said Act, then each of said owners of each of said pieces of land so described in said report, and each of the owners of the improvements thereon, and each lessee, or claimant or other person having or claiming an interest therein, shall execute and deliver perfect deeds of conveyance of the perfect title to said lands or improvements, or make proper acquittances from those entitled to compensation other than for damages to lands or improvements, and to do and 783 perform every other act necessary to place the title and possession of each of said parcels of land in the City and County of San Francisco.

And it is further ordered, adjudged and decreed, that upon the payment or tender, or deposit in the manner prescribed by said Act, of the several sums, or either of such sums set opposite any of the pieces of land described in said volume of said report: "Report Damages Widening Dupont Street," then an execution may immediately issue to the Sheriff of the City and County of San Francisco, commanding him to put said Board in possession of said lot so paid for, or for

784 which the money is so deposited or tendered for said City and County of San Francisco.

And it is further ordered, adjudged and decreed, that judgment be, and is hereby entered against each and every of the lots of land particularly described in said volume of said report, entitled " Report Damages Widening Dupont Street " in favor of said City and County of San Francisco, condemning and adjudging the title thereto, henceforth to be in said City and County, for the use of said City and County forever, and that the value of said land, and the improvements thereon is hereby adjudged and decreed to be the several amounts
785 fixed and stated in and by said volume of said report, and which are set opposite to the description of said several parcels and improvements in said report, which said report is hereby referred to and made a part of this order for a more detailed and particular description.

Order made in open Court, December 20, 1876, Selden S. Wright, County Judge of the City and County of San Francisco.

Plaintiff also read in evidence from said minutes of December 20th, 1876, the following order made on said day:

786 " And now on motion of Wm. M. Pierson, Esq., attorney for said Board of Dupont Street Commissioners, and it appearing to the Court that all the petitions heretofore filed against the confirmation of said report had been dismissed or otherwise disposed of, and no opposition being made to granting of said motion. It is ordered that the order made on Tuesday, December 19th, 1876, continuing the hearing of this matter until Friday, December 22nd, 1876, at 2 o'clock P. M., be vacated and set aside."

Plaintiff next offered in evidence the petitions referred to in the orders. It was agreed that all of said petitions being substantially the same *mutatis mutandis*,

787 he should read one of said petitions, and the others should be considered as read, in pursuance of which agreement, plaintiff read the petition of Thomas H. Blythe, in the matter of the widening of Dupont street, filed October 20th, 1876, and which is as follows:

" In the matter of the widening of Dupont street.

To the Honorable the County Court of the City and County of San Francisco.

The petition of Thomas H. Blythe, respectfully shows that at the last session of the Legislature of this State, an Act was passed, entitled " An Act to authorize the widening of Dupont street in the City and County of San
788 Francisco," which said Act was approved March 23d, 1876, and took effect immediately. That by the 8th Section of said Act it is provided that any person interested in any piece or parcel of land situated within the district defined and described in Section 3 of said Act, or in any of the lands taken for said street, or in any improvements damaged by the opening of said street, feeling himself aggrieved by the action or determination of the Board of Dupont Street Commissioners provided for by said Act, as shown in the report provided for in Section seven of said Act, may, at any time within
789 30 days after the completion of said report, and the publication of a notice that the same is open for inspection, apply by petition to the County Court of the City and County of San Francisco, setting forth his interest in the proceedings had before said Board, and his objections thereto, for an order on said Board requiring it to file with said Court the report of said Board, and such other documents or data as may be pertinent thereto, in the custody of said Board, and used by it in preparing said report; that your petitioner is the owner of the following described lots of land, situated and included within the district designated in Section three of said Act as the

791 district benefited by said improvements, and upon which the cost of making the same is to be assessed, viz.:

[Reading of description excused by Court.]

That said Board of Dupont Street Commissioners have completed the report provided for by Section 7 of said Act, and have caused notice to be published, as provided in said section; that the same is open for inspection; that the first publication of said notice was made on the 23d day of September, A. D. 1876, and that 30 days have not expired since the completion of said report; that in said report said Board have set down a description of each of the aforesaid subdivisions or lots
791 of land included in the district designated in Section 3 of said Act, and have set against each of said lots or subdivisions the name of your petitioner as the owner or claimant thereof. That opposite to the description thereof, and against the respective lots or subdivisions above described, said Board have set the following sums or amounts, as the sum or amount in which, according to the judgment of the Board, the said lots would be respectively benefited, by reason of the widening of said street, relatively to the benefits accruing to other lots of land within said designated district, viz.: opposite the
792 first of lots, the sum of $48,240; opposite the second of said lots, the sum of $43,873; opposite the third of said lots, the sum of $2,424; opposite the fourth of said lots, the sum of $522; opposite the fifth of said lots, the sum of $2,249.

That in said report said Board has stated and set down the description of the lots and subdivisions of land above described, and which is included in the land taken for the widening of said Dupont street, and has stated the sum of $97,308 as the damage done to the improvements thereon. All of said valuations have been made by said Board on the basis of gold coin.

Your petitioner further shows and states as his objec-

793 tions to said report, and reasons why said report should not be approved or confirmed by this Court:

1st. The Board of Supervisors of the City and County of San Francisco have never, by resolution or order, expressed in any form that it was their judgment that it would be expedient that Dupont street be widened in accordance with and in the mode prescribed by said Act, and have never passed any resolution or orders expressing their judgment upon the subject of widening Dupont street, as authorized by Section 21 of said Act.

2d. The said Board of Dupont Street Commissioners have never published the notice provided for by Section
794 6 of said Act. The only notice published by said Commissioners was before the resolution referred to in in the 21st section of said Act had been passed by the Board of Supervisors and the resolution adopted by said Board of Commissioners, April 14th, 1876, under which the Secretary of said Board subsequently caused a notice to be published in the Daily Alta California and the Daily Evening Bulletin, did not specify any papers in which the said notice should be published, nor did said Commissioners give to said Secretary any authority to publish said notice in said papers; the publication by him in
795 said papers was without authority and insufficient to comply with the requirements of said Act.

3d. The said report shows that the value of the land taken and the damages to improvements thereon or adjacent thereto, and injured thereby, and all other expenses whatsoever incidental to the taking and widening of said street is as follows, viz.:

Value of real estate taken	$639,913
Damages to improvements	126,501
Actual and contingent expenses of Commissioners	131,691
	$898,105

796 That said Board at its meeting on the 23d day of September, A. D. 1876, adopted as the report of actual expenses incurred, and estimated expenses, actual and contingent, to be incurred in the matter of widening Dupont street, from Bush to Market street, viz.: Various items amounting in the aggregate to the sum of $131,-691; that one of the items as specified therein, and forming a part of said estimated amount of $131,691, is the following, viz.: Estimated incidental expenses to accrue up to and until the close of the duties of the Board, advertising, removing improvements, expenses of any litigation that arise, drawing deeds,
797 damages, if any, from change of grade, and any other item of damage and expense that may be incurred and not set forth in the report, $98,935.71, the valuations of benefits to the lands within the district was adopted by the Board before this estimate of expense had been agreed upon, viz.: On September 16th, 1876, and this item is evidently a (forced balance) adopted for the purpose of making the (costs) equal the benefits; said item of estimated expenses is grossly disproportionate to any possible expense that may be incurred under the provisions of the Act, and is illegally included in said report, and is
798 without authority therefor in said Act. All the expenses that may accrue, or be legally incurred, are included in other items in the resolution adopted on said date.

By the second section of said Act, the cost of widening said street is defined to be "The value of the land taken, the damages to improvements thereon, and all expenses whatever incident to the widening of said street."

By the Act itself, the expenses of removing the improvements is to be borne by the owners thereof, or the purchasers under a sale of the same; the parties making the deeds are to prepare and tender the same to the Board, the expense of grading the street is to be assessed upon the adjacent property in the same manner, as if the said

799 street remained of its original width, and there is no fact presented, and nothing shown from which it can be inferred that any litigation will arise, or that there are or will be any damage from any change of grades.

Your petitioner, therefore, makes the objection that 9 per cent. and upwards of the entire cost of the proposed improvements, for conjectured expenses that may never arise, and which are not shown to have any foundation in fact, or to be based upon any principle, is greatly in excess of what should be allowed, and ought not to be assessed upon the property which is by the Act compelled to bear the expense of widening said street.

800 Only fixed and definite expenses can be allowed under said Act as a proper portion of the "cost of widening said street," and such expenses should be specifically set forth in the report, so that persons interested may know for what purpose their land is taxed.

The assessment or appraisement of benefits against the aforesaid lots of land belonging to your petitioner as shown by the said report is unjust, relatively unequal in the amounts assessed to other lots, and disproportionate to the benefits which are stated in said report, as accruing to other lots of land within the district designated by said Act; the said lot just above described and which is

801 assessed $48,240 for said improvements, as the estimated benefits accruing thereto, is not only not benefited in the least degree, but is absolutely injured by the widening of Dupont street, inasmuch as the current of travel is diverted from Market street, and the Market street front is thereby rendered less desirable for stores and retail business.

Petitioner further avers that as to the parcel of land secondly above deseribed, the amount assessed thereon is excessive, unequal and unreasonable; that no such benefit could possibly accrue thereto.

That if said lot were benefited at all by the widening of

802 Dupont street, the benefit could not exceed $5,000; and the amounts assessed upon the remainder of said lots are also excessive and unequal; that said Commissioners have not also assessed the property on the west line of said street upon any principles of fairness or justice, but have assessed much less amounts for benefits than they should have done, and have made extravagant allowances for all property taken for the widening of said street.

Petitioner further alleges that said act of the Legislature is unconstitutional and void.

Wherefore your petitioner prays for an order requiring said Board of Dupont Street Commissioners to file with
803 this Court the report of said Board, and all documents and data pertinent thereto, in the custody of said Board, and which were used by it in preparing said report.

THOS. H. BLYTHE.
H. H. HAIGHT,
Attorney for Petitioner."

Upon each petition of the several petitioners who interposed objections to the confirmation of the report of the said Board of Dupont Street Commissioners, an
804 order was made and signed by the Judge, which, *mutatis mutandis* as to each petition was in the words and figures following, to-wit:

"*In the County Court of the City and County of San Francisco, State of California:*

In the matter of widening Dupont street, by the Board of Dupont Street Commissioners:

Thomas H. Blythe, having on the 20th of October, A. D. 1876, filed his petition in this Court in the above entitled proceeding, saying that he is interested in certain

805 pieces or parcels of land taken by said widening of Dupont street, and damaged by the same, and that he feels himself aggrieved by the action of said Board of Dupont Street Commissioners, setting forth the character and extent of such grievance and his interest in such proceeding, and praying for an order on said Board requiring it to file with said Court its said report and such other documents or data as may be pertinent thereto, in the custody of said Board, or used by it in the preparing of said report, which petition was filed within 30 days of the completion of said report, and a copy thereof duly served on a member of said Board, and this Court hav-
806 ing on the 20th day of October, 1876, made an order setting said petition for hearing on Friday, the 27th of October, 1876, and it having been stipulated by and between said petitioner and said Board of Dupont Street Commissioners that all and every, the allegations and matters in said petition contained, should be taken to be generally and specifically denied and traversed by said Board of Dupont Street Commissioners, and said hearing having been duly and regularly continued from day to day until this day.

Now, on this 19th day of December, A. D. 1876, in
807 pursuance of said order of the 27th of October, A. D. 1876, the said petition coming on to be heard in open Court, the said petitioner appearing by his attorney, H. H. Haight, Esq., and the said Board of Dupont Street Commissioners appearing by Wm. M. Pierson, Esq., the attorney of said Board, and the members of said Board being present in person, it appearing that the said application was properly before the Court, this Court proceeded to the hearing of the allegations of said petition of said Thomas H. Blythe, and it appearing that the said Board of Dupont Street Commissioners on, to wit, the 22d day of October, A. D. 1876, did duly present and file with this Court its said report and all other

documents or data pertaining thereto, and it further appearing that the said report, as soon as the same was completed, was left at the office of the Board of Dupont Street Commissioners daily, during ordinary business hours, for thirty days, for the free inspection of all parties interested therein, and notice that the same was open for inspection at such time and such place was duly published by said Board daily for twenty days in two daily newspapers printed and published in said City and County, as required by law, and this Court having heard said petition and report, and heard and considered the said application and the arguments of counsel thereon, and it appearing to the Court therefrom that the said report ought to be modified in the particulars hereinafter specified, on motion of H. H. Haight, Esq., attorney for said petitioner, the Board of Dupont Street Commissioners assenting thereto; it is ordered, and this Court by virtue of the power and authority in it vested, doth order and direct, that said report be and the same is hereby referred back to the said Board of Dupont Street Commissioners, and that said Board be and it is hereby directed to alter and modify the same in the manner following, viz :

In the volume of said report known as the "Report Benefits Widening Dupont Street," at page 1, in Block 98, at subdivision 1, in the column headed "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures $48,240, and in lieu thereof there shall be inserted the figures $13,500.

Also, in the same volume, page 1, Block 98, at subdivision 2 in the column headed "Enhanced Value or Amount of Benefits Assessed," there shall be stricken therefrom the figures $43,873, and in lieu thereof there shall be inserted the figures $23,187.

Also, in the same volume, at page 2, in Block 98, at subdivision 4, in the column headed "Enhanced Value, or

811 Amount of Benefits Assessed," there shall be stricken therefrom the figures $2,424, and in lieu thereof there shall be inserted the figures $2,264.

Also, in the same volume, at page 2, in Block 98, subdivision 6, in the column headed "Enhanced Value, or Amount of Benefits Assessed," there shall be stricken therefrom the figures $522, and in lieu thereof there shall be inserted the figures $602.

Also, in the same volume, at page 3, in Block No. 98, at subdivision 7, in the column headed "Enhanced Value, or Amount of Benefits Assessed," there shall be stricken therefrom the figures $2,249, and in lieu thereof there
812 shall be inserted the figures $100.

And, on motion of W. M. Pierson, Esq., attorney for said Board, H. H. Haight, attorney for said petitioner, assenting thereto; it is further ordered that, except as above granted, all and singular each and every claim, objection and prayer, in said petition contained, be and the same are hereby overruled and denied.

Order made in open Court, December, 18th, 1876.

SELDEN S. WRIGHT,
County Judge of the City and County of San Francisco."

813 But, as all of said orders, *mutatis matandis*, are the same, insertion thereof herein is hereby waived, with a right to either party, upon any hearing or argument of this case in the Superior or Supreme Court, to read or refer to said orders, and that the Court shall consider the same, with the like force and effect as if the same were incorporated herein at large. All of said orders bear date, and were made and filed on December 18th, 1876, save and except in the cases of L. Carriveaux, which was made and filed December 19th, 1876, and Maria Maurin, which was made and filed December 20th, 1876.

Plaintiff next offered in evidence the Block Book filed

814 in the County Court, October 27, 1876, and also the Map Book filed in the County Court, October 22, 1876.

The defendant duly objected, separately, to each and every of the foregoing minutes, orders, petitions, and block book and map book, on the ground that they were each and all incompetent, irrelevant and immaterial.

Whereupon the Court overruled, separately and distinctly, each and every of said objections.

The defendant duly excepted to each separate ruling of the Court.

Exception No. 35.

815 Whereupon said minutes, orders, petitions, block book and map book, etc., were duly read in evidence.

JAMES P. DAMERON, being duly sworn and examined as a witness on the part of plaintiff, testified as follows:

I appeared for Mr. Carriveaux, and had charge of his objections in the County Court.

Question. Who did you make the arrangement with?

Defendant objected on the ground that the same was incompetent, irrelevant and immaterial.

The Court overruled the objection, and defendant duly excepted.

Exception No. 36.

816 Question. Was Mr. Carriveaux's objection arranged?

Answer. Yes, sir.

Question. Who did you arrange it with?

Answer. Mr. Pierson and Mr. Tibbey.

Question. What was the arrangement?

Answer. It was one of the last, and we were opposed to paying the levy on the street. I told him that his assessment must be reduced. At last we agreed they should reduce it $1,000 and pay my fees, to withdraw his objections. They paid me $500 attorney fee. Mr. Tibbey paid me. There was some difficulty about paying, and I held back. I thought they didn't wish to pay, and I held back until I got my money.

817 CROSS-EXAMINATION.

The matter came up regularly in Court and was continued from time to time. At last we consented and went in, and on motion of Mr. Pierson, by my approval, it was passed by the Court.

Question. Was there any concealment about the matter?

Answer. Nothing said by both parties. Only we went in and made our statement; we agreed to it.

JOHN J. ROCHE, being duly sworn on behalf of plain-
818 tiff, testified as follows:

I was the attorney for Mr. Marsicano in the County Court.

Question. Was there ever any hearing on your objection?

Defendant objected on the ground it was incompetent, irrelevant and immaterial.

The Court overruled the objection and defendant duly excepted.

Exception No. 37.

Answer. My recollection is that the arrangement was had with Mr. Pierson We were to have certain reduc-
819 tion from the amount of benefits or the amount of damages—I am not sure which; at all events, there was a reduction that inured to our benefit; the same deduction that appears in that report; $4,000 was the amount, I think. Mr. Marsicano paid my fee. I received no money from the others.

CHARLES H. REYNOLDS, being duly sworn on the part of the plaintiff, testifies as follows:

I was one of the experts on the value of the Dupont street land taken.

Question. Do you recollect of any arrangement for a

820 sale of what was called the Griffin lot on the street there?

Defendant objected on the ground that the same was incompetent, irrelevant and immaterial.

The Court overruled the objection and defendant then and there duly excepted.

Exception No. 38.

Answer. Yes, sir. This lot was situated on the northwest corner of Dupont and O'Farrell. It was 36 6-12 by 80 feet. I negotiated the purchase of the lot from Griffin; it was made July 22d, 1876. I received the order to purchase from Mr. Richd. Ivers; he was also an expert. I
821 received the commissions on the sale when the transaction was consummated. The amount of the purchase money was $75,000; the commission one and one quarter per cent. I made the deposit myself and furnished the money at first. I supposed the purchase was for Mr. C. B. Land. The deed passed, I think, to Robert Watt and Francis Berton of the French Bank, one or the other of those gentlemen.

CROSS-EXAMINATION.

The commission charged was less than the usual rate
822 —the usual rate was two and a half per cent.—we compromised by their paying 1¼ per cent.

There was nothing whatever peculiar about this transaction. I had the property for sale before that for Mr. Griffin—as much as six months before, and before my connection with the Dupont street matter.

My connection with that sale had nothing to do with my action as expert—the appraisement of property on Dupont street was made before the sale was made of this piece of property. There was nothing secret—nothing to conceal about it—it was a transaction in the usual course of my business. Am in the real estate business,

823 and have been some sixteen or eighteen years in this city.

JOSEPH WELLSFORD, being duly sworn on behalf of plaintiff, testifies as follows:

I am chief mail clerk of the "Examiner," and have been about twelve years. I have the files of that paper here, for the month of May, 1876, and for the whole year.

I find the second Resolution 8,693 in the "Examiner" for April 18th—new series—it is there on the 19th, 21st and 22d. For the 20th, it is in the supplement. The
824 supplement is enclosed in the paper, and marked supplement to the Daily Examiner, page 5.

Plaintiff offered in evidence Resolution No. 8,651, passed May 1st, and approved by the Mayor May 3d, 1876, as follows:

"Resolution No. (New Series.)

Resolved, that in the judgment of this Board, it is hereby declared to be expedient that Dupont street, in the City and County of San Francisco, be widened under and in accordance with, and to the extent and under the conditions prescribed in an Act of the Legislature of the State of California, entitled "An Act to authorize the
825 widening of Dupont Street in the City of San Francisco," approved March 23d, 1876.

And the Clerk is hereby directed to advertise this resolution as required by law.

In Board of Supervisors, San Francisco, April 17th, 1876, passed for printing by the following vote:

Ayes—Supervisors Bryan, Wise, Shine, Eaton, Hayes, Strother, Boyce, Roberts, Gibbs and McDonald.

Excused from voting—Supervisor Edwards. Absent —Supervisor Drucker.

JOHN A. RUSSELL,
Clerk."

826 CROSS-EXAMINATION.

There was one issue of this supplement issued with each number of the paper on that date.

Q. Be good enough to state to the Court how many issues of this supplement were issued on that date?

A. One for each number of the paper issued.

Q. What was done with these supplements?

A. Circulated with the papers.

Q. Enclosed in the papers?

A. They were given to the carriers to fold.

Q. Distributed in the same way, and at the same
827 time with the paper itself?

A. They were circulated with the paper, distributed in the same way and at the same time as the paper itself, and goes to every subscriber who takes the paper. There is contained in this supplement, besides this particular resolution, resolutions of the Board, Sheriff's sales and legal notices; the balance of the supplement is taken up with other official notices. It is only printed on one side; one side is blank—it has been published this way a long time, ever since we had any pressure of the city printing. Don't recollect how long—know we published it in 1872. The supplement is published only when we
828 have a pressure of business. When we get a quantity of advertising to be put in the paper we issue a supplement. At the time inquired of, this newspaper was doing the city printing and was called the official paper of the city.

The first column is "Daily Examiner," in type of the usual head of the paper; the date is Thursday, April 20th; the top of the supplement is headed "Supplement to the Daily Examiner, page 5."

Question. Mr. Wellsford, can you state to the Court if that has been the usage of newspapers published in

829 this City and County with reference to the publication of supplements ?

Plaintiff objects to that as incompetent.

The Court sustained the objection and defendant duly excepted.

Exception No. 38½.

The Court. I should be inclined to rule that out, unless you confine it to the custom of this newspaper.

Defendant's Counsel. We don't ask in regard to this newspaper, but the custom of newspapers. We propose to prove the general custom of newspapers.

830

RE-DIRECT EXAMINATION.

I had something to do with the issuing of the paper. Have folded some, but not all. Saw nearly all of them folded, but not all. One was counted out to each paper. I can't tell whether the carriers delivered anything more than the paper or not, or whether they delivered the paper or not. It was not published on Sundays—it was only an occasional thing that a supplement was published.

Question by Defendant's Counsel. Can you state in a few words how many pages the Examiner was composed
831 of that day ?

Answer. Five.

Question. Was that one of the pages of the Examiner on that day ?

Answer. Yes, sir.

To each of these two questions, plaintiff at the time they were propounded, objected on the ground that each was incompetent—that the paper spoke for itself, and that the paper should be in evidence.

The Court sustained the objections, ordered the answers thereto to be stricken out, and allowed the paper in evidence, stating that the files were admitted in evidence,

832 to show how many pages the Examiner consisted of on that day."

The defendant duly excepted.

Exception No. 39.

The insertion of said paper and supplement in this statement is hereby waived, with the understanding that upon any argument or hearing of this case in the Superior or Supreme Courts, either party may refer to or read said paper and supplement, and the Court shall consider the same as if incorporated herein.

I find a notice about Dupont street, of which a copy is
833 set out in the evidence of Henry J. Kelly, hereinafter stated in the paper of April 12th, in the body of the paper. That is the first notice. Also on the 13th and 14th, and on the 15th. There was none issued on the 16th, it being Sunday. I find it on the 17th and on the 18th; it is in the supplement, page 6—it is not in the body of the paper on that day. On the 19th it is in the body of the paper, also on the 20th, 21st, and on the 22d, Saturday. It is also in the body of the paper on the 24th—it was in the body of the paper every day, except the 18th; it was then in the supplement.

834

RE-CROSS EXAMINATION.

The supplement in which the publication occurs in this connection is the same as the other supplement, only it is page 6, instead of page 5, and was published, circulated and distributed as I have described the other was.

All I have stated about the other supplement, equally applies to this supplement.

Our paper is published daily, Sundays and legal holidays excepted.

The second notice was not published in this paper.

Plaintiff's counsel admits as to the 30 days' notice,

that it was published in the Examiner the 23d day of September, to and including the 30th of October, 1876.

HENRY J. KELLY, being sworn and examined on the part of plaintiff, testified as follows:

I have the files of the Bulletin of 1876.

On the 12th of April, 1876, I find a notice in regard to the Dupont street matter. It is as follows:

"NOTICE.—Office of Board of Dupont Street Commissioners, southwest corner of Kearny and Clay streets, room No. 12.

"SAN FRANCISCO, April 11, 1876.

"In pursuance to Section 6 of the Act of the Legislature of the State of California, entitled: An Act to authorize the Widening of Dupont Street in the City of San Francisco, approved March 23d, 1876, notice is hereby given to all property owners along the line of Dupont street from Market street to Filbert street, that the Board of Dupont Street Commissioners, as provided for by said Act, is now organized. All persons interested in property sought to be taken, or which would be injured by the widening of said Dupont street, are notified to present to the Board maps and plans of their respective land, and a written statement of their claim or interest in said land.

A. J. BRYANT,
Mayor of said City and County.
GEO. F. MAYNARD,
Auditor of said City and County.
WM. P. HUMPHREYS,
Surveyor of said City and County.
Dupont Street Commissioners.
H. S. TIBBEY,
Secretary."

April 12th, 11 times."

838 This appears in the issue of the 12th, 13th and 14th, and in the supplement of the 15th—daily supplement, San Francisco, Saturday evening, April 15th, 1876. It is not in the body of the paper of that day. The 16th was Sunday—it is in the 17th, 18th, 19th, 20th, 21st, in the body of the paper, and in the supplement, of the 22d, and not in the body of the paper.

CROSS-EXAMINATION.

When I say it wasn't in the body of the paper, I mean the paper as it is issued every day except Saturday. It
839 contains every day except Saturday four pages, and on Saturdays six pages.

The supplement and daily paper of Saturday makes Saturday's daily.

The print of the supplement is the same—it contains reading matter and advertisements the same as the rest of the paper.

It has been customary to put in the additional two pages of Saturday, eight years to my knowledge. It goes with the paper and constitutes part of it. It speaks for itself and is not any different from what you see.

840 Plaintiff puts the two supplements in evidence.

Witness reads from paper the second notice, May 4th, as follows:

NOTICE.—Office of the Board of Dupont Street Commissioners, southwest corner Kearny and Clay streets, room 12.

SAN FRANCISCO, May 3d, 1876.

In pursuance of Section 6 of an Act of the Legislature of the State of California, entitled "An Act to authorize the widening of Dupont street in the City of San Francisco," approved March 23, 1876, notice is hereby given to all property owners along the line of Dupont

841 street from Market to Filbert street; the Board of Dupont Street Commissioners as provided in and by said Act is now organized.

All persons interested in property sought to be taken and which would be injured by the widening of said Dupont street, are notified to present to the Board maps and plans of their respective land, and a written statement of the nature of their claim and interest in such land.

A. J. BRYANT,
Mayor of said City and County of San Francisco.
GEO. F. MAYNARD,
842 Auditor of said City and County of San Francisco.
WM. P. HUMPHREYS,
Surveyor of said City and County of San Francisco.
Dupont Street Commissioners.
H. S. TIBBEY,
Secretary.

May 4th, 11 times."

This notice is published in the Bulletin on the 4th and 5th of May, on the 6th in the supplement of the paper issued on that day, the 6th being Saturday.

The 7th was Sunday, and it was not published on that
843 day.

It was published in the Bulletin on the 8th, 9th, 10th, 11th, 12th, and the supplement to the Bulletin of the 13th, that being Saturday.

It was not published on the 14th, that being Sunday, but was published in the issues of the Bulletin of the 15th and 16th of May, inclusive.

The supplements I here speak of, were of the same character, and published and circulated in the same manner as those I have already described.

The plaintiff offered and read in evidence one of said supplements, they all being of the same general character; the insertion thereof in this statement is hereby

waived, with the understanding that upon any argument or hearing of this cause in the Superior or Supreme Court, either party may, upon such hearing or argument, refer to, or read any of said supplements, and the Court shall consider the same with the like force and effect, as if they were all incorporated in this statement.

JOHN WHITE, being duly examined as a witness on behalf of plaintiff, testifies as follows:

I have the files of the Morning Call for September and October, 1876. On September 24th, I find a notice of Dupont street. It is as follows:

"NOTICE.

Office of the Board of Dupont Street Commissioners, southwest corner Kearny and Clay streets, room No. 12.

SAN FRANCISCO, Sept. 23d, 1876.

Notice is hereby given to all persons, that the report of the Board of Dupont Street Commissioners in the matter of widening Dupont street between Bush and Market streets, in the City and County of San Francisco, State of California, have been completed under, and in accordance with the Act of the Legislature of the State of California, entitled "An Act to authorize the widening of Dupont street in the City of San Francisco," approved March 23d, 1876, and the same are open for free inspection of all parties interested, at the office of the Board above specified, and the same will remain so open for free inspection daily, during ordinary business hours, for thirty days from this date.

A. J. BRYANT,
Mayor of said City and County of San Francisco.
GEORGE F. MAYNARD,
Auditor of said City and County.
WM. P. HUMPHREYS,
Surveyor of said City and County.
Board of Dupont Street Commissioners.
H. S. TIBBEY,
Secretary."

847 That was the first publication—then it was published the 25th and 26th and 27th in the body of the paper, and on the 28th it is in the supplement.

It is entitled, "Morning Call Supplement, San Francisco, Tuesday morning, September 28th, 1876."

It is published in the body of the paper on Sept. 29th and 30th, and on Oct. 1st and 2d.

On Oct. 3d, it is in the supplement; on Oct. 4th, 6th, 7th, 8th (the 8th was Sunday), 9th, 10th, 11th, it is in the body of the paper, and on the 5th and 12th, it is in the supplement.

Also in the supplement to the paper of the 13th. It is
848 in the 14th. That was the last publication.

CROSS-EXAMINATION.

I have been connected with the Morning Call about 11 years. It is a daily newspaper.

The supplements to the Morning Call that have been mentioned herein, were published, distributed and circulated in the same manner Mr. Wellsford describes of the Examiner.

On the dates that supplements are published, six separate pages constitute the paper—four pages the body and
849 two the supplement. That comprises the Morning Call on that day.

Plaintiff offers one of these supplements in evidence.

The plaintiff offered and read in evidence one of said supplements, they all being of the same general character; the insertion thereof in this statement is hereby waived with the understanding that upon any argument or hearing of this cause in the Superior or Supreme Court, either party may, upon such hearing or argument, refer to or read any of said supplements, and the Court shall consider the same with the like force and effect as if they were all incorporated in this statement.

850 H. S. TIBBEY, being recalled for plaintiff, testified as follows:

I prepared the first set of notices under the first resolution. I wrote out the first resolution that was passed by the Board of Supervisors.

Question. As to the second set of notices—those that were after the second resolution of the Board of Supervisors—did the Board pass any order directing you to publish them, or directing their publication?

Defendant objected, on the ground that it was incompetent, irrelevant and immaterial.

The Court—I suppose the record of their proceedings
851 will show.

Plaintiff's Counsel—The records of their proceedings show no order. I propose to show by Mr. Tibbey that he selected papers himself, and published notices without any order.

The whole record has been introduced and no order appears under the second resolution fixing the newspaper or directing notice to be published.

The Court—You wish to prove negatively by parol that there was no order made.

Plaintiff's Counsel—Yes, I wish to show that he selected the papers himself and made the publication himself.
852

The Court—What is the objection?

Defendant's Counsel—The objection is as against the Intervenors here; it is incompetent by parol to falsify the records and proceedings of these Commissioners and of the records of the County Court.

The Court overruled the objection, and defendant excepts.

Exception No. 40.

Answer. I think there is some order in the book. I would like to look at the book before I make an answer. I think there was an order there (after referring to the

853 book.) There is nothing. I think there is another book.

(The witness is shown another book.)

That is a record or minute book of the Board, and is supposed to be a copy of the other with some other matter put in it. It was made just before the report was confirmed or before the report was completed by the Board.

The attorney wanted to have the second publication of these notices and a resolution authorizing them to appear in the minute book, as they didn't appear in the first minute book, and to accomplish that this second minute book was written.

854 They may have authorized those things to have been done during the time, and they were not put in the minute book; the publicaton may have been authorized. I may not have put that in the book; the notices were published. Mr. Pierson, as a matter of safety, wanted the second notices to appear in the minute book, and they didn't appear in the first minute book, consequently he had a new minute book, and that was put in.

The Board directed the publication of the notices. There is a record here showing that.

(Witness refers to page 10 of the second book.)

855 I find a resolution in this minute book as to the publication of the second set of notices. It is as follows:

"Resolved, That upon the final passage of an order or resolution by the Board of Supervisors of the City and County of San Francisco, under the provisions of Section 21 of the Act of the Legislature of the State of California, entitled, "An Act to authorize the widening of Dupont Street, in the City of San Francisco," approved March 23, 1876, the Secretary of the Board is hereby authorized and empowered to give and cause to be published the notice in the manner required by said Act and in the form adopted by this Board at its meeting of April 10th, 1876."

856 Q. Was there any other resolution passed as to these second lot of notices?

A. I think that one covered both.

Q. The Board organized under the first resolution?

A. Yes, sir.

Q. Did it ever make any formal organization under the other resolution?

A. There was only one organization of the Board that I know anything about.

I can explain the matter of this second resolution, and the circumstances of its introduction in a minute.

The attorney for the Board thought that the first reso-
857 lution passed by the Board of Supervisors was defective, and he wanted a second one passed by the Board of Supervisors, and a second set of notices published under it, which was done; and the first resolution and the first set of notices published under it were not in it when they came to hand the report—not in the Minute Book.

The attorney of the Board wished that second resolution, and the second set of notices to appear in the Minute Book, and the second Minute Book was written up so as to make it complete.

Q. The thing I want to know or get at is, as to these second set of notices that the Board acted on as a
858 Board.

A. I don't think there was any formal action taken by the Board, or either of them. It was left to the attorney to attend to.

Q. If the Board acted upon them, why didn't it put it in the first Minute Book?

A. It was not deemed necessary at that time to do it, and it was a forethought just before the report was completed to have both of these proceedings appear in full in the Minute Book, and this is why the second Minute Book was written up, and the first one discarded.

Q. State, if you know, why it happened that the re-

859 port was finally confirmed two days before the day it was set for in the County Court.

State, if you know, any circumstances which led to that, and what they were?

Defendant objected to the question on the ground that it was immaterial.

Plaintiff's Counsel. This testimony is offered with the view of showing there was no publicity to these changes, and they were hurried through, and there was a reason for it—that other objections were anticipated.

The Court overruled the objection, and defendant duly excepted.

860 *Exception No. 41.*

A. My recollection is, that the day set in the County Court for the final confirmation of the report was anticipated by two or three days owing to some information that there was to be another opposition put in on the part of Mr. Fitch & Mastick.

Q. State what happened?

A. Mr. Mastick came to me and asked me when this matter——

Defendant's counsel here objected to the answer of the witness, on the ground that it was entirely hearsay.

861 The Court overruled the objection, and defendant duly excepted.

Exception No. 42.

The witness continues: He knew this matter was coming up again in the County Court. I told him. He said he wanted to put in some objection—to file some opposition to the confirmation of the report on behalf of Mr. Fitch. I reported this conversation to Mr. Pierson, and to save that opposition being put in, and more litigation and trouble in the matter, the matter was brought up sooner, and the report was confirmed. That is the reason why it was done.

862 CROSS-EXAMINATION—NONE.

85

Plaintiff offered in evidence the petition filed in the County Court on the 20th of December, 1876, for a confirmation of the report, which is as follows:

"In the County Court of the City and County of San Francisco, State of California: In the matter of the widening of Dupont street by the Board of Dupont Street Commissioners. The petition of A. J. Bryant, Mayor of the City and County of San Francisco, George F. Maynard, Auditor of the City and County of San Francisco, and Wm. P. Humphreys, City and County Surveyor of
863 said City and County of San Francisco, constituting the
8 Board of Dupont Street Commissioners, Petitioners, represent to this Honorable Court that under the provisions of a certain Act of the Legislature of the State of California, entitled, "An Act to authorize the widening of Dupont street in the City of San Francisco," approved March 23, 1876, your petitioners organized on the 3d day of April, 1876, as a Board of Dupont Street Commissioners; that the proceedings of your petitioners as such Board, and the proceedings of the Board of Supervisors of the City and County of San Francisco, were fully set forth and detailed at length in the final report of your
864 petitioners, filed in this Honorable Court on the 27th day of October, 1876.

That certain petitions were duly filed in this Honorable Court, asking a modification of the said report, all of which have been withdrawn, dismissed or acted upon by this Court, and on certain of said petitions this Honorable Court has made certain orders, directing your petitioners to modify said report in certain particulars.

That your petitioners have fully complied with the said orders, and now bring said report into Court as so modified, and there are no further or other petitions or objections against said report.

865 That in all things your petitioners have complied with the provisions of said Act of the Legislature, as appears by said report. Wherefore, your petitioners pray that said report, as so modified, be confirmed and approved, and your petitioners will ever pray, &c.

Dated Dec. 20th, 1876.

A. J. BRYANT,
Mayor of the City and County of San Francisco.
GEORGE F. MAYNARD,
Auditor of the City and County of San Francisco.
WILLIAM P. HUMPHREYS,
Surveyor of the City and County of San Francisco.

866

THOMAS B. BISHOP, a witness on behalf of plaintiffs, testified:

That about the month of March, 1878, one Leo Maurer and others, including some only of the plaintiffs in this action, instituted a suit in the District Court of the 19th Judicial District of the State of California, in and for the City and County of San Francisco, to restrain and enjoin the then Tax Collector of the City and County of San Francisco from selling their property on account of the Dupont Street assesment, then by the Tax Collector claimed to be delinquent for the levy of the year 1877
867 and 1878; that witness was the attorney for the plaintiffs in that suit, and that they obtained a restraining order, and an order to show cause why an injunction should not issue in that behalf. On the hearing of said motion, the Court refused to grant the injunction, and set aside the restraining order. Thereupon, the plaintiff in that action, in order to protect their property from forced sale by said Tax Collector for said assessment, paid the same under protest, and said action was dismissed and discontinued by the plaintiffs therein without prejudice to a new action.

Here the plaintiff rested.

868 WM. A. PIPER, called, sworn and examined as a witness
85 on the part of defendant, testified as follows:

I reside in this city, and have resided here since 1849. I am one of the intervenors in this case. I have fifty of these Dupont Street Bonds. I own them. Got them from Mr. Sutro, a broker, on September 14th, 1877, and paid him 95 cents for them, and think I paid the commissions in addition—¼ of one per cent. I paid cash. At the time I bought them, I knew of no fraud or illegality or wrong that had been committed in that Dupont street improvement.

I bought those bonds as an investment—supposed them
869 to be good bonds.

8 Of course, it was a business matter; I didn't invest $47,000 to throw these bonds away.

Before purchasing, to ascertain their validity, I made inquiry, and was advised, not by Jarboe & Harrison here, but from other gentlemen that I had confidence in, that they had examined the whole matter for Mr. Phelan, and gave an opinion that the bonds were valid and legally issued.

CROSS-EXAMINATION.

870 I bought these bonds on the 14th of September, 1877. I may have read something about this Dupont street matter in the papers prior to that time, but don't think I did, as I was away at the time this was going on. I came back to San Francisco some time in March, 1877. I think it was 1877; am not positive whether it was 1876 or '77. It was some months after Hayes was inaugurated. That was March 7, 1877. I was in Washington up to that time.

I got some of the San Francisco papers while I was there, but I don't recollect reading anything about the Dupont street matter prior to my return—it was something I had no interest in at the time. I know Mr.

871 Matthewson. He frequently came into my office prior to the purchase of the bonds by me.

It is very likely I talked to him prior to the purchase. He talked to me about everything.

I always ran away when he talked to me.

I don't recollect that I had any conversation with him about this subject prior to the purchase.

He may have talked to me about it, however, and I not recollect it.

Defendant offered in evidence one of the Dupont street bonds, the form of which is as follows:

872

873

874 UNITED STATES OF AMERICA,
STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO,

[$1,000.] [*Picture of a Crowded Street.*] [$1,000.]

DUPONT STREET BOND.

875 THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, WILL PAY TO .....or the holder hereof, the sum of One Thousand Dollars Gold Coin of the United States of America, twenty years from the date hereof, with interest thereon in like Gold Coin at the rate of Seven per cent. per annum, payable half yearly on the first day of July and the first day of January of each year, upon interest coupons hereto attached. Principal and interest payable at the office of the Treasurer of said City and County of San Francisco.

876 This Bond is issued under the provisions of an Act of the Legislature of the State of California, entitled: "An Act to authorize the Widening of Dupont Street, in the City of San Francisco," approved March 23d, 1876, and is to be paid out of the fund that may be raised by taxation as therein provided, and may be redeemed at any time before its maturity, as is provided in said Act. And this Bond is further issued and taken by the holder hereof under the conditions expressed in Section Twenty-two (22) of said Act, which is as follows:

877 "SECTION 22. The completion of the work described in this Act, shall be deemed

expressed in Section Twenty-two (22) of said Act, which is as follows:

877 "SECTION 22. The completion of the work described in this Act, shall be deemed an absolute acceptance by the owners of all lands affected by this Act, and by their successors in interest of the lien created by this Act upon the several lots so affected, and it shall operate as an absolute waiver of all claim in the future upon the City and County of San Francisco for any part of the debt created by the Bonds authorized to be issued by this Act, and their successors in interest. This shall be regarded as a contract between said owners and the holders of said bonds and said City and County, and this provision shall be stated on the face of the Bonds."

878 *In Witness Whereof*, The Mayor, the Auditor, and the City and County Surveyor, of said City and County of San Francisco, constituting the Board of Dupont Street Commissioners, have respectively signed these presents and caused to be affixed hereto the official seal of said City and County of San Francisco, as of the first day of January, 1877.

879 Seal of City and County of San Francisco.

A. J. BRYANT,
Mayor of the City and County of San Francisco, and President of the Board of Dupont Street Commissioners.

GEO. F. MAYNARD,
Auditor of the City and County of San Francisco, and a Member of said Board.

WM. P. HUMPHREYS,
City and County Surveyor of the City and County of San Francisco, and a Member of said Board.

[COUPONS ATTACHED,]

880 WM. M. PIERSON, recalled and examined on the part of defendant, testified as follows:

Defendant offers to show by this witness that the parties within the region affected by this Dupont Street Act, themselves employed counsel to draft the Act, and procured the passage by the Legislature.

Plaintiff objects to this on the ground that the same is irrelevant.

The Court sustained the objection and defendant excepted.

Exception No. 43.

881 JOSEPH ROSENBERG, being duly sworn and examined on the part of defendant:

I reside in this city and county, and have since 1872. Knew Mr. Reese in his lifetime. He was an uncle of mine—he is dead. I am one of the executors of his will.

He owned $30,000 of these Dupont street bonds. All I know about the purchase of these bonds is, that he purchased them at different dates as an investment.

On Nov. 6, 1877, he purchased $10,000, for which he paid 90 cents; on February 20, 1878, $10,000, for which he paid 85 cents, and on March 6th, he bought $10,000, for which he paid 85 cents.

882 I was perfectly familiar with my uncle's business. I think there was nothing came into the office that didn't come under my knowledge.

I knew that the interest was being paid on it—he bought them in good faith. He knew of no irregularities.

The witness here produced in open Court, and exhibited said thirty thousand dollars bonds; being the same mentioned in the intervention herein, but as they are all the same in form, insertion thereof herein is hereby waived, and upon any argument of this cause in the Superior or Supreme Court, the same may be re-

883 ferred to by either party, and shall be considered by the Court with the like force and effect as if they were all incorporated herein.

CROSS-EXAMINATION.

I mean by good faith, that he bought them for investment and interest paid.

When I say he bought them in good faith, I mean that he bought them as an investment. He had faith in them, and believed in them as a good investment.

That is all I mean to convey by the expression "good
884 faith."

Q. As to what he knew about the matter alleged, concerning the manner in which these assessments were to be made, you don't know anything at all?

A. I had some conversation with my uncle about these bonds, and he said they were really City and County bonds.

Q. Then the reason that he bought them, and was willing to buy them, in his opinion, it was that he thought that the City and County was bound by it?

A. Yes, sir. The proposition in his mind was, that this was the bond of the City and County of San Fran-
885 cisco.

Q. That was the ground he put it on?

A. Yes, sir; he knew that the land and Dupont street were further security for those bonds.

Q. How do you know that he knew that?

A. From conversations in the office.

Q. What was that conversation?

A. When he bought them, he generally stated—he gave a reason why he did.

Q. What were the reasons?

A. He thought they were City and County bonds. He thought the City and County might be held respon-

886 sible in case of litigation afterwards. Of course when he bought them he didn't know.

Q. He spoke of litigation?

A. He always looked into the future.

He said that in case of any litigation, he first looked upon the taxes which would come from the Dupont street assessment as security for the bonds; then in case of any litigation, because he always expected litigation, that the City and County would be held responsible.

Mr. Reese was a constant reader of the newspapers—he read two or three a day.

887 If this matter was published generally in the newspapers, then he knew about it.

A. P. SMITH, being sworn and examined as a witness on the part of defendant, testified as follows:

I reside in San Francisco, and have resided there about five years.

I know Mr. D. O. Mills. Am in his employ as confidential clerk and private Secretary. Have been so employed for five years back.

I know of these Dupont street bonds.

Mr. Mills, as Treasurer of the University, on the 14th
888 of January, 1878, bought and paid for at the rate of ninety cents, forty thousand dollars of these bonds.

They were bought as an investment for the permanent endowment fund of the University of California.

On the 6th of February following, he bought five thousand of them himself at 89 cents.

Mr. Mills is now in New York—has been since last October.

Question. Will you please state what, if anything, you know, as to Mr. Mills knowing of any fraud, irregularities, or secret vices in the proceedings taken to widen Dupont street?

889 Objected to by plaintiff's counsel on the ground that the same is immaterial, irrelevant and incompetent, and further for the reason that the witness can't know what Mr. Mills knows.

The Court sustained the objection and defendant duly excepted.

Exception No. 44.

I think Mr. Mills bought these bonds of a broker in the usual course of business. Somebody had them for sale and he bought.

To the best of my recollection, James Colgan was the
890 name of the broker from whom he bought them.

CROSS-EXAMINATION.

Question. Did you purchase any of these bonds?

Answer. No, sir. The way I know that Mr. Mills bought them is, that I drew the check and submitted it to him for his signature and received the bonds.

I acted as Mr. Mills' clerk in the matter.

Question. All that was done in your presence was simply drawing the check and taking the bonds?

Answer. I know it pretty well when it has got that
891 far. I know that the Finance Committee had to pass its resolution before Mr. Mills got them.

I know it by familiarity and repute of the common practice of the Board of Regents.

Question. You saw the bonds there and you drew the check? What else did you know of your own knowledge?

Answer. I knew by common practice that Mr. Mills didn't act without this resolution of the Finance Committee. I was not present when the resolution was passed. I didn't read it. All that I know about the bonds that Mr. Mills purchased is, that he told me that

892 he had bought a number of them, and instructed me to give a check for it.

The resolution of the Finance Committee of the Regents of the University of the State of California, authorizing the purchase of said bonds was produced, and insertion thereof herein is waived; said forty thousand bonds of said University, and said five thousand dollars of said bonds of said D. O. Mills, being the same referred to on the intervention herein, were produced in evidence, but the insertion thereof is hereby waived, and that upon any argument of this case in the Superior or Supreme Court, the same may be referred to by either party, and shall be
893 considered by the Court with like force and effect, as if they were incorporated herein.

CHARLES F. MACDERMOT, being duly sworn and examined as a witness on behalf of defendant, testified as follows:

I reside in Oakland—have resided there for twelve years. Do business in San Francisco, and have for 25 years past.

I am one of the intervenors in this case.

I have twenty Dupont Street Bonds.

In March, 1877, I think, I bought on joint account with
894 another gentleman, 84 bonds—a thousand dollars each, at 94½ cents, in the City of San Francisco.

The bonds which I hold now, are part of that purchase.

To ascertain the validity of these bonds, we had the advice of Jarboe & Harrison, who went over it carefully, and looked into the matter, and gave a written opinion as to the validity of the bonds.

I made all the inquiries that I could at that time from other persons.

There was no such thing talked of at that time as fraud, or irregularities, or secret defects affecting the validity of

895 the improvements of widening Dupont street. It was just then that the bonds were issued. I think at the time I bought the bonds, there were some one or two houses that had not been moved back.

This was early in March, 1877.

After the bonds had all been negotiated, the street was graded, buildings erected along the line of the street, and some moved back.

The buildings that were erected there are the finest in the city. Those that were there before were generally old rookeries.

There was not much delay after the matter was ne-
896 gotiated in completing and widening the street, and placing the improvements along the line of it.

CROSS-EXAMINATION.

James Phelan was connected with me in the purchase of the bonds. We bought them from a man by the name of Cousin, one of the property owners who owned these bonds.

I haven't got the written opinion of Jarboe & Harrison. Mr. Phelan retained it, and I think it is in Court.

897 I read nothing in the newspapers about this Dupont street matter prior to my purchase. If there had been anything in the newspapers, I think I would have seen it. If I had seen anything, of course I would not have taken any. If it had been there, I would have been likely to see it.

Defendant offers bonds in evidence, being the same mentioned in intervention, but insertion thereof is waived, under the same stipulation heretofore set out herein, with respect to the other bonds.

JAMES PHELAN, being duly sworn and examined as a witness on the part of defendant, testified as follows:

898 I reside in this city—have resided here some thirty years. I know these Dupont street bonds—I have nine of them myself, and hold fifty additional bonds for other parties. I bought some of the bonds at the time they issued. I bought fifty at 95 cents at my first purchase in February, 1877.

Witness is here shown a notice published in the Alta California of the date of May 26, 1877.

Defendant offers said notice in evidence, which is as follows:

" Dupont Street Bonds—Notice for Proposals. Office of the Treasurer of the City and County of San Fran-
899 cisco, March 5, 1877.

" Sealed proposals for the unsold balance of the bonds of the City and County of San Francisco, and authorized to be issued under the Act of the Legislature of the State of California, entitled, 'An Act to authorize the widening of Dupont Street, in the City of San Francisco, approved March 23d, 1876,' will be received each Monday hereafter up to and including Monday, the 28th day of May, A. D. 1877, at the office of Charles Hubert, Treasurer of the City and County of San Francisco, State of California, in the City Hall, in said City and County.

900 " Each bond is for one thousand dollars gold, payable in twenty years, and bearing interest at seven per cent. per annum, payable semi-annually, on the first days of January and July respectively, on interest coupons. Principal and interest payable at the office of the Treasurer of said City and County.

" Bidders will specify the amount of bonds bid for, the number of cents on the dollar bid in gold coin, and each bid must be accompanied by a bond on the part of the bidder, with one or more sureties, satisfactory to the Mayor, Auditor and Treasurer of said City and County, equal to ten per cent. of the amount bid, conditioned

that if an award is made by the undersigned, the terms of the bid will be complied with by the bidder.

"No bids will be entertained, nor any bonds awarded, at a less price than 95 cts. on the dollar, nor without being accompanied by such bond.

"The undersigned reserves the right to reject any and all proposals.

"All persons entitled to damages by the widening of said Dupont street, may bid for bonds to the extent of the sum awarded to him, or for any lesser sum, specifying in his proposal that he will accept bonds at the price stated in his bid in compensation for the damages so awarded in his favor, and such bid being equally as advantageous as the best cash bids, will be accepted in preference to cash bids.

"The amount of the balance of said bonds to be sold will not exceed $300,000.

"All bidders will enclose their bids in a sealed envelope with their bond as aforesaid, and endorse them on the back 'Dupont Street Bonds—Proposals.'

"All proposals will be opened in the presence of the Mayor, Auditor and Treasurer of said City and County, each *Monday* to and including the 28th day of May, 1877, at 12 o'clock noon, at the office of the Treasurer aforesaid, and bonds will be awarded to the highest bidder, subject to the limitations aforesaid.

A. J. BRYANT,
Mayor of the City and County of San Francisco.
GEO. F. MAYNARD,
Auditor of said City and County.
CHARLES HUBERT,
Treasurer of said City and County."

I took fifty, the first award that was made.

At the second time, about 14 or 15 days afterwards, I bought $15,000 at 95 and a fraction. After that I made another purchase—10 or 11 days after the second.

904 That notice was the same as the other notice. I think the amount of the third purchase was fifty thousand.

After that, when I was in New York, after the Secretary told me that there were some of these bonds that were not sold; there were forty or fifty thousand left, I telegraphed that I would take them. I took them at 95 cents.

Question. How much would you aggregate the purchase to be, Mr. Phelan?

Answer. Well, $407,254.40 in the City Treasury for bonds.

Question. That is what you paid for the purchase,
905 direct through the Board of Dupont Street Commissioners?

Now, I understand that you purchased others outside of what you bought direct from the Commissioners; you bought from Cousin?

Answer. Yes, sir; I took half of them; about $75,000 all told.

Before I did anything, I went to Jarboe & Harrison and told them I wanted them to look into that thing thoroughly, as I wanted some, and my friends wanted some, and see if they thought they were all right.

They took the matter into consideration, and gave me a report in writing.

906 I had other advice—had some in New York and here—I had the Mayor's; he assuring me in a letter that they were the best, and advising me to buy those bonds, if I had any money.

CROSS-EXAMINATION.

Defendant offers letter from Mayor Bryant to Mr Phelan above referred to in evidence, and also the opinion from New York.

Mr. Wm. M. Evarts is the person who advised me in New York. This advice was given me before I bought some of the bonds, and after I had bought some.

907 Before I bought these bonds that remained in the Treasury.

That opinion was in writing. I think it is in New York. I stated the case to Mr. Evarts—I was one of the parties who called on him. Another person was with me—a banker by the name of Russell. He knew nothing about the facts, except what I told him.

We had the statute, Mayor Bryant's letter, and the opinion of the attorney for the Dupont Street Commissioners.

"OPINION OF JARBOE & HARRISON.

908

SAN FRANCISCO, March 7th, 1877.

JAMES PHELAN, ESQ.—*Dear Sir:*

First. The Dupont Street bonds are issued under a special Act of the Legislature, and are to be paid out of the special tax levied upon the district named in said Act.

Second. The City and County of San Francisco is not liable for any portion of said bonds.

Third. If all of the bonds are sold for an amount sufficient to pay the damages appraised by the Commis-
909 sion, the street will be widened according to the Act.

Fourth. If the sale of the bonds shall not raise money enough to pay such damage, there will be no authority to take the property, and the tax cannot be collected.

Fifth. The district upon which the tax is to be levied is the property by which the bonds are secured. Of its value you are better able to judge than ourselves, but we believe that it has been this year assessed at a value many fold that of the entire amount of the bonds proposed to be issued, and that such value will increase from year to year.

Yours respectfully,

JARBOE & HARRISON."

910 "OPINION OF W. M. PIERSON.

JAMES PHELAN, ESQ.—*Sir:*

In reply to your communication of even date herewith, inquiring into the validity of the statute of this State under which the Dupont Street bonds are issued, and the regularity of the proceedings for the widening of Dupont street under such statute, I give you my opinion as follows:

The statute of March 23d, 1876, providing for the work and bonds, is not a novel one in our State, and
911 presents no peculiarities that require notice.

An Act precisely similar, indeed, and almost exact counterpart in its language and provisions, has been declared constitutional in the case of Doyle against Austin, 47th California Supreme Court Reports, page 353, and with this authoritative support, I have no hesitation in advising you that the statute of March 23d, 1876, is unquestionably constitutional. The proceedings under the Act have been entirely under my supervision and control, and have been conducted with the most scrupulous care and attention. They have been examined by a number of eminent lawyers, and have been pronounced
912 regular in all respects.

In some instances, written opinions have been prepared, sustaining the validity of the entire proceeding.

Some of them were written for capitalists who contemplated purchasing the bonds and some for property owners who intended to oppose the report of the Commissioners in the County Court, but upon the opinion of their attorneys, concluded not to make the opposition, but irrespective of my own or others' opinions upon the regularity of the proceedings, I advise you that the final confirmation of the report of the Commissioners by the County Court was a final adjudication of the regularity of

913 the preliminary proceedings, and whatever defects there might have been therein, (of which there are none) have been entirely remedied and cured by that final confirmation, and in addition to all this the widening of Dupont street is such an emphatic improvement to property and the district assessed for it, and the property owners affected by it have been so unanimously in favor of it, that there is no conceivable probability that any one could be found to raise any objection of any kind. I remain, yours very respectfully,

WM. M. PIERSON,

Attorney for the Board of Dupont Street Commissioners.

914 San Francisco, Feb. 23, 1877."

I had read the San Francisco papers before this but had seen nothing in the papers about it, but have since—I think the first time was about a year after I had bought the bonds.

The papers stated, to the best of my recollection, that parties were going to oppose the issuance of these bonds.

This was the only investment in City and County bonds that I had made. I was familiar with the price of State or City and County bonds.

915 The City and County 7 per cent. bonds were worth about 103 or 104, about 4 per cent. premium.

There were other City bonds of San Francisco—the San Jose Railroad bonds, and some of the city slip property for settling with parties. They were about par. I know they were probably one, two or three per cent. premium.

They were short bonds—had three, four or five years to run. The longer bonds have to run the more valuable they are..

I had at one time $429,000 worth of bonds of my own—that is, 429 bonds—had them all in the spring of 1877. I have a few of them now. I sold about one-half of these

916 bonds immediately after I bought them for from 103 to 112.

Sold them in New York. It was probably five months ago that I reduced them down to 9.

The City redeemed 60 or 70 of them.

DAVID KAHN, called, sworn and examined as a witness on behalf of defendant, testified as follows:

I reside in San Francisco—have resided here nearly twenty years. Have been engaged in the banking business for past five years.

We bought some of the Dupont street bonds on De-
917 cember 6, 1877, and on January 31st, '78, bought ten bonds at 92¼ the first time, bought at next purchase ten bonds at 90c net. The next purchase was April 2, 1878, of seven bonds at ninety net.

These were all the purchases—the name of our banking house is Lazard Freres.

We purchased those bonds in the usual course of business. I knew of no fraud, irregularities or secret vices affecting the validity of the proceedings for the widening of Dupont street. Before we buy any bonds, we study very carefully whether they are good bonds or not, and we believed them to be good bonds at the time of the
918 purchase.

CROSS-EXAMINATION.

In this particular instance, I don't recollect in what manner we studied it—as a general rule we consulted our attorney—I don't recollect what we did at this time.

Our attorney at the time was H. K. W. Clarke, now deceased.

I don't recollect whether we consulted him or not. I think he was consulted. We were dealing in other securities at that tine. The other bonds of the City and County of San Francisco were selling at that time at par

919 and a little premium, except the Montgomery Avenue bonds and the Dupont street bonds. I knew that fact at the time.

J. A. DONOVAN being sworn and examined as a witness on the part of defendant, testified as follows:

I am Deputy Treasurer in this city and county—have been one year. I have here one of the books in the City Treasury relating to the Dupont street bonds.

This book shows the number of bonds issued. The number is one thousand.

It was here agreed between counsel that the witness
920 should furnish the reporter with a list of the bonds when disposed of, to whom, and for what price.

The list is as follows:

DUPONT STREET BONDS—COPY FROM CASH BOOK.

1877.				
Jan. 4	A. E. Head	96 bonds	at par	$96,000
4	Jno.'nd C'th'rine Morgan	16 "	"	16,000
8	Cornelius O'Connor	18 "	"	18,000
8	Seth Cook	20 "	"	20,000
8	John P. Jones	26 "	"	26,000
8	H. Ickleheimer	14 "	"	14,000
921 11	M. Schwamm	16 "	"	16,000
11	H. E. Fisher	19 "	"	19,000
16	W. S. Hobart	21 "	"	21,000
15	Donald McLea	13 "	"	13,000
Feb. 3	Robt. Watt	42 "	"	42,000
Mar. 7	Sutro & Co	40 bonds	at 95c	38,000
15	James Phelan	120 "	95	114,750
20	"	80 "	95	75,800
22	G. W. Osborne	15 "	95	14,250
22	N. Cousin	73 "	95	69,350
Apr. 5	C. F. Fargo	28 "	95	26,600
10	H. H. Noble	2 "	95	1,900
16	Adams & Kibbe	48 "	95	45,600

922

20—G. Middlehoff	20	bonds at	95c.	19,000
27—Hyam Joseph	15	"	95	14,250
27—Louisa M. Babcock	20	"	95	19,000
27—David Hunter	76	"	95	72,200
28—W. W. Young	15	bonds at	par	15,000
May, June and July—Jas. Phelan.	147	bonds at	95c	139,650
				966,350

J. A. DONOVAN,
Deputy Treasurer.

923 Defendant here offered to show that Cornelius O'Connor, Seth Cook, H. Ickleheimer, George Kavanagh, A. E. Head, Mrs. Louisa M. Babcock, Daniel Cook, Henry Fisher, Hyam Joseph, A. H. Rutherford, George Dickson and D. McLea, within the district defined in the Dupont street Act, were property owners, and their property was appropriated for the widening of that street—that they received bonds or cash, as the case may be, for the property appropriated, and these very parties are now seeking to enjoin the collection of the tax levied for the purpose.

Plaintiff objects, on the ground that it is incompetent, irrelevant and immaterial, and is *res inter alios acta.*

924 The Court sustained the objection, and defendant duly excepted.

Exception No. 44.

The foregoing is a statement of all the evidence adduced upon the trial of said action with the ruling of the Court thereon, and after argument of the counsel for the respective parties, the case was submitted for decision, and thereafter the Court rendered the following decision, to-wit:

925 [Title of Court and Cause.]

OBJECT OF THE SUIT.

This is an action to enjoin the Tax Collector from selling certain real estate in the City and County of San Francisco, for what is known as the "Dupont Street Tax."

By the Act of March 23d, 1876, (p. 43a), the Legislature provided for the widening of a portion of Dupont street, at the cost of the adjacent property.

Provision is made for the issue and sale of bonds to meet the cost in the first instance, and for the levy of an
926 annual tax on the lands benefited, in proportion to the benefits, to pay the interest on the bonds, and provide a sinking fund for the payment of the principal. The bonds are issued in the name of the City and County, but payable only out of the fund raised by such tax upon the lands benefited, and run twenty years at seven per cent. per annum, interest payable semi-annually.

Execution of the Act—how Entrusted.

1. The execution of the Act was entrusted to a Board of Commissioners named by the Legislature, and consist-
927 ing of the Mayor, Auditor and City and County Surveyor.

Until the case of the *People* vs. *Lynch*, 51 Cal., 15, the legislative authority over local municipal affairs in this State seems to have been regarded by the Courts as practically unlimited.

Thus, in *Creighton* vs. *San Francisco*, 42 Cal., 450, it is said: "The power of the Legislature to appropriate the moneys of municipal corporations in payment of claims ascertained by it to be equitably due to individuals, though such claims be not enforceable in the Courts, has been uniformly upheld ever since the case of *Blanding* vs. *Burr*, 13 Cal., 351, in which this Court said:

928 The power of appropriation which the Legislature can exercise over the revenues of the State, for any purpose which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city or town, for any purpose connected with their past or present condition, except as such revenues may, by the law creating them, be devoted to special purposes." (See, also, *Blanding* vs. *Burr*, 13 Cal., 351; *Payne* vs. *Treadwell*, 16 Cal., 233; *People* vs. *San Francisco*, 36 Cal., 601; *Sinton* vs. *Ashbury*, 41 Cal., 530; *San Francisco* vs. *Canavan*, and *San Francisco* vs. *Hotaling*, 42 Cal., 557, 558; *San Francisco* vs. *Real Estate*, 42 Cal, 513, 519, to the
929 same effect.)

LEGISLATIVE POWER RESTRICTED.

But in *People* vs. *Lynch*, 51 Cal., 15, the Legislature had undertaken to legalize an invalid street assessment; a kind of legislation sanctioned it was claimed by all the authorities and especially in *People* vs. *San Francisco*, 36 Cal., 601.

But the Supreme Court held the Act unconstitutional, and in an able and exhaustive opinion by McKinstry, J., in which the authorities, and especially the leading de-
930 cisions of that Court, are reviewed, the doctrine is announced:

(1) "That the inhabitants of a city cannot be deprived of their right to have such matters as are placed by the charter under the supervision and control of the legislative department of the city government passed upon by their representatives in the City Council.

"The Legislature cannot, in a special case, deny to the proper city authorities that discretion which they may ordinarily employ with respect to local improvements.

(2) "That the power of 'assessment'—distinguished from that of taxation as ordinarily employed—cannot be

931 directly exercised by the Legislature within the limits of an incorporated city; following herein the doctrine of *Taylor* vs. *Palmer*, 31 Cal., 252, 253, where it is said that the Legislature cannot deal with the subjects of local assessments at all, except through the intervention of a municipal corporation, and while working under the provisions of Article IV, Section 37, of the Constitution then in force."

There is a manifest distinction between the appointment of Commissioners by the Legislature to take the whole matter of the improvement into their own hands and make the assessment of damages and benefits, in-
932 dependent of municipal control, and their appointment by the municipal authorities, or by the County Court, in aid of some part of the proceeding, and as part of the municipal machinery for that purpose.

The Second street cut cases, the Kearny street cases, and the matter of Beale street, are examples of the latter class.

The Commissioners were only called in as auxiliary to the proceeding, and as part of the municipal machinery for the purpose of insuring, if possible, a fair and equitable adjustment of the damages and benefits. (Stat. 1863-
933 4, p. 347, 350; Stat. 1867-8, p. 463; Ibid, p. 594, 597.)

NATURE OF THE COMMISSION.

In the present case the Commissioners are named in the Act, and entrusted with the entire management and control of the proceedings, subject only to the confirmation of the County Court on an *ex parte* application.

And the fact that all the Commissioners were municipal officers cannot affect the question, for they do not act as officers of the City and County in executing the provisions of the Act, but as a Board of Commissioners, independent of Municipal authority and control.

934 APPORTIONMENT OF THE TAX.

It is true, the annual apportionment of the so-called "tax" is left to the City and County Assessor.

But this apportionment is a mere matter of mathematical calculation.

The basis upon which the appointment is made is the assessment of "benefits" made by the Commissioners. It is this, and not the actual computation and apportionment of the Assessor, which constitutes the real "assessment" in the case, and the levy, the real levy of the tax, is the act of the Legislature and not of the municipality.

935 Each lot is assessed by the Commissioners in the full amount which, in their judgment, it has been or will be benefited by the improvement.

This amount, and something more, is imposed by the Commissioners as a burden on each lot, as its proportion of the cost of the improvement.

The burden is distributed by the Act over a period of twenty years, and the formal calculation by which the distribution is annually effected during that period is intrusted to the Assessor. But his acts are clerical and ministerial, while the acts of the Commissioners were legislative and judicial.

936

THE ACT UNCONSTITUTIONAL AND VOID.

The substance of all the authority conferred by the Legislature is conferred upon Commissioners named by itself, and the shadow only of authority is left in the municipality,

The widening of Dupont street, the assessment of damages and benefits, the imposition of the burden, is done by the Legislature through an independent agency of its own, and the assessment and collection of the annual tax which is to pay off this burden, is left to the municipal authorities.

937 In my judgment, the Act falls clearly within the principles of *People* vs. *Lynch*, and is unconstitutional and void.

THE CASE NOT AFFECTED BY THE CONSENT OF THE SUPERVISORS.

And the case is not affected by the fact that under the Act the consent of the Board of Supervisors was obtained. For the power of the Legislature, under the provisions of the old Constitution, over the subject of local assessments within the limits of a municipal corpor-
938 ation, did not in any manner depend on the consent of the corporation.

It was a power which the corporate authorities might receive at the hands of the Legislature, but which the Legislature itself could not exercise except through the agency of the corporation itself.

DIFFERENCE BETWEEN BENEFITS REPORTED AND CONFIRMED, COST OF IMPROVEMENT AND AMOUNT OF BONDS.

2. The total amount of benefits to all the property
939 within the designated district, as reported by the Commissioners, and confirmed by the County Court, was less than the total cost of the improvement, as ascertained in the same manner, by over $118,000—exactly $118,004.

Bonds were issued for the full amount of the cost of the improvement, and nearly or quite $85,000 in addition.

Total issue	$1,000,000
Total cost of work	914,941
Total benefits	796,837

In the case of the *Tide Water Company* vs. *Coster*, 18

940 N. J. Eq., 526–527, an Act of the Legislature was declared unconstitutional, which authorized the whole expense of drainage to be assessed upon the lands benefited, without making provision for the indemnification of the owners in case the expense should exceed the benefits.

See also to the same general effect: *State, etc.*, vs. *Mayor of Hoboken*, 36 N. J. Law, 291; *Chamberlain* vs. *Cleveland*, 8 Reporter, 596.

Says Gilmore, C. J., in *Chamberlain* vs. *Cleveland:*

"The right that gives to municipal corporations the privilege of resorting to this mode of taxation, is not
941 like the right of general taxation in the State, founded on necessity * * * but on a principle of justice, by which the public may take from an individual, whose lands, owing to their proximity to it, are specially benefited, such a portion of the cost thereof, as is equivalent, but not in excess, of the special benefits confirmed by the improvement; and this principle of justice in itself impliedly furnishes the measure, and limits the extent of the right."

To show that the assessment is confined to such property, and limited to the value of the special benefits conferred, as above indicated, see *Seville* vs. *Cleveland*, 1
942 Ohio St., 126; *Hill* vs. *Highdon*, 5 Id., 243; *Meissner* vs. *Toledo*, 31 Id., 387; *Tide Water Co.* vs. *Coster*, 3 C. E. Green, 518; *Hammett* vs. *Philadelphia*, 65 Penn. St., 146; *Thomas* vs. *Gaines*, 35 Mich., 156; *Nichols* vs. *Bridgeport*, 23 Conn., 204; *Matter of Flatbush Avenue*, 1 Barb., 286; *Matter of Fourth Avenue*, 4 Wend., 452; *Matter of Albany Street*, 11 Id., 149; *Matter of William and Anthony Street*, 19 Id., 678; *Emmerson* vs. *Saltmarsh*, 7 Ad. and E., 266; *Dore* vs. *Gray*, 2 T. R., 358; *Stafford* vs. *Haineton*, 2 Brod and Bing., 691.

In *Tide Water* vs. *Coster* (Supra), it did not appear that the assessment would exceed the benefits, but the Court

943 held the act void, because under it the assessment *might* exceed the benefits.

Here, it was judicially ascertained, and in the mode provided by the Act, that the assessment would exceed the benefits. And if an assessment on the basis of benefits is impliedly limited in amount to the value of the benefits, as ascertained in the mode provided by law, and is void if in excess of such benefits, it is none the less void because it is distributed over a period of twenty years, and only a small percentage of the entire burden is required to be discharged each year.

944

THE REMEDY.

3. As to the remedy:

It is claimed that if the assessment is void, it is void on its face, and no injunction will lie.

But the case of the *Savings and Loan Society* vs. *Austin*, 46 Cal., 488-9, distinctly recognizes the principle that an injunction will lie against a Tax Collector when it appears that the enforcement of the tax would lead to a multiplicity of suits.

And I do not understand any of the cases to deny the doctrine.

945

AN OREGON CASE.

The case of *Coulson* vs. *Portland*, Deady, 481-495, was a similar case to this, arising under a city ordinance providing for the levy and collection of an annual tax for the period of twenty years in payment of interest coupons on railroad bonds. The Court says: If the ordinance only provided that this tax should be levied and collected once, then it might be said that the complainants had a plain, adequate and complete remedy at law, and therefore could not maintain this suit in equity.

But the ordinance provides for a levy and collection of

946 taxes to pay these coupons, once a year for a period of twenty years.

To recover them back, or defend the possession of the property sold for them, will require a multiplicity of suits, and what is more, arising separately through a long period of time.

THE PREVENTION OF REPEATED SUITS.

The bringing of repeated suits weekly for the recovery of wages claimed to be due to an employee weekly, under a contract for labor, has also been held sufficient to war-
947 rant an injunction to prevent a multiplicity of suits (*Tarbox* vs. *Hockenstein*, 4 Baxter, 78.)

So, upon a bill to enjoin the collection of a promissory note already in suit, and to restrain defendant from transferring other notes of the same character not yet due, an injunction is proper for the purpose of preventing a multiplicity of suits upon the several notes, and in order that the whole matter be determined upon the proceeding in equity (*Zeigler* vs. *Beasey*, 44 Ga., 56.)

So an injunction lies when the Act in question is one necessarily affecting all the inhabitants of the district named, who, in respect of persons or property, are liable to
948 taxation under its provisions, and a bill is filed to test the validity of the Act (*Bull* vs. *Rand*, 13 Gratt, 86.)

Says Lee, J., (p. 87): "It may be that for each act of the Board of Commissioners affecting the inhabitants of the district, every one who is aggrieved, might have a remedy at law of some sort, more or less effectual, but the remedy in equity would be far more perfect, adequate and complete, and as the acts of the Commissioners would be in their nature continuing and to be renewed from time to time, to restrict the parties to their legal remedies, would be to consign them to interminable litigation, and insure endless multiplicity of suits."

949 I think the present is a proper case for the application of the principal.

Decree for plaintiff.

EDMONDS, Judge.

And thereafter the Court filed its findings in said cause, and judgment was entered therein in favor of the plaintiffs therein. Upon the foregoing statement of the case, the defendants assign and specify the following errors of law committed by the Court upon the trial of said cause, and will rely upon the same on motion for a new trial herein, and upon appeal, that is to say, all the rulings hereinbefore set forth, and to which exceptions were sev-
950 erally taken as hereinbefore set forth, being the exceptions numbered from 1 to 43 inclusive, and the defendants hereby specify the particulars in which the evidence is insufficient to support the decision and judgment of the Court in the following particulars and respects, that is to say:

The fourth finding of the Court is contrary to the evidence, and the evidence is insufficient to support the same in this, that the evidence shows that the supplement of the papers therein referred to were part and parcel of said papers, and published, distributed and circu-
951 lated at the same time and in the same manner, and as part of said paper, and had co-extensive circulation with said paper, and that such supplements were published as and according as the exigencies of the business of such papers required the publication thereof, and the notices in said finding mentioned were published in the papers and in the manner disclosed in the foregoing statement.

That finding 7 is contrary to the evidence and the evidence is insufficient to support the same in this, that the evidence shows that the resolution therein mentioned was published at the time and in the manner required by law, and the same was published in a newspaper there-

952 in mentioned, and the supplement of said paper in said finding mentioned was part and parcel of said newspaper, and was printed, published and circulated in the same manner and gave the same publicity as any other part of said newspaper, and publication of said resolution in said supplement furnished all the notice to the public that publication thereof in any other part of said newspaper would have given.

That finding 8 is contrary to the evidence, and the evidence is insufficient to support the same in this, that the evidence shows that said Tibbey was authorized to pub-
953 lish said notice; that the same was properly published, that the supplements to the newspapers in said finding mentioned were part and parcel of the respective newspapers therein named, printed, published and circulated in the same manner as said newspapers, and that publication of such notice in said supplement furnished all the publicity to the public that publication thereof in any other part of said newspapers on said respective dates could or would have furnished to the community.

Finding 9 is contrary to the evidence, and the evidence is insufficient to support the same in this, that the case
954 shows that said Board of Dupont Street Commissioners did subsequent to the date therein mentioned, convene, organize and act as a Board of Dupont Street Commissioners, and did procure and adopt an official seal, and published the notices of them required to be published under the provisions of said Act of the Legislature.

That findings 17 and 18 are contrary to the evidence, and the evidence is insufficient to support the same in this, that the evidence shows that said report was made in conformity with the provisions of said Act of the Legislature, and contained therein all and singular the mat-

955 ters therein required to be contained, and set forth by the provisions of said Act of the Legislature.

Finding 21 is contrary to the evidence, and the evidence is insufficient to support the same in this, that the evidence does not show that the experts or Board of Dupont St. Commissioners treated each lot taken as of the same value as a front lot of only 30 feet in depth, or that they estimated the same at 200 per cent. greater, than it in fact was, or any percentage greater than the actual value of the same, or that they adopted a false rule for ascertaining the value of the same, or that the rule adopted by them was not equal or uniform, and
956 there is no evidence to show that the valuations made by said Board of Dupont Street Commissioners or said experts were not fair, just and proper, and there is no evidence to show omission from the estimate of benefits to lots on the west side of said Dupont street, two-thirds of the actual benefits, or any benefit actually accruing to said lands, and there is no evidence to show that such estimate, and all of the estimates made by said experts and said Board of Dupont Street Commissioners, were not fairly made in the exercise of their best judgment and in accordance with the facts and evidence bearing
957 upon the subject.

Finding 22 of the Court is contrary to the evidence, and the evidence is insufficient to support the same in this, that there is no evidence to show that said Board of Dupont Street Commissioners arbitrarily, or at all, added the same money therein mentioned, or any sum of money to the cost of making said improvement.

That finding 24 is contrary to the evidence, and the evidence is insufficient to support the same in this, that the evidence shows that *the notice therein mentioned* was legally published for the time required by law, and that the supplements of the papers there in said finding

958 named, were part and parcels of such papers printed, published and circulated at the same time, and in the same manner, and circulated co-extensively therewith, and furnished all the publicity to the public of the matters contained therein, that publication of the same in any part of the same papers would or could have given.

That finding 25 is contrary to the evidence, and the evidence is insufficient to support the same in this, that the evidence shows that all parties concerned had full notice of the filing of the objections therein mentioned,
959 and of all action taken thereon, and the plaintiffs herein and their predecessors in interest were fully aware of the same, and the plaintiffs and their predecessors in interest at all times not only knew, but had the means of knowing of the filing of said objections, the alleged grounds for the filing of the same, of the action had thereon, and that they refrained and desisted from making any complaint concerning the same, because they were contented therewith.

And the evidence wholly fails to show that the changes and modifications in the report in said finding men-
960 tioned were not fair, just and proper, and that the same were not made by the County Court and by said Commissioners in the exercise of an honest, sound and judicious judgment and discretion.

Finding 26 is contrary to the evidence, and the evidence is insufficient to support the same in this, the action of said County Court upon the said objections was not pursuant to any arrangement, and was not in the absence of any of the parties to said proceedings or without notice to them, or that the action of said Court was not regularly had in due and orderly course of judicial proceedings, or that said Court did not act upon the

961 evidence before it, in the exercise of its own judgment.

Finding 27 is contrary to the evidence and the evidence is insufficient to support the same in this, that there is no evidence to show that the changes and alterations ordered by the County Court were ordered by the consent of the objectors and Commissioners alone or without investigation of the subject matter of the objections, or without any actual consideration of the merits, or without any proof of any kind; but on the contrary, the evidence shows that all
962 parties to said proceeding had notice thereof, that the Court acted upon the evidence submitted to it, and its action was determined in the exercise of the judgment of the Court on the evidence before it, with such proof as the parties deemed fit to submit thereon to the Court.

Finding 28 is contrary to the evidence and the evidence is insufficient to support the same in this, that there is no evidence to show that the changes and alterations in the report of said Dupont Street Commissioners were made and consented to by the Board of Dupont Street Commissioners for the sole purpose of inducing
963 the objectors to withdraw their objections or to prevent an examination of said report on its merits, or without disclosure to the Court of the circumstances under which such alterations were consented to or of the motives that influenced the Commissioners in consenting to the same, but on the contrary the evidence shows that all the parties to said proceedings were fully apprised thereof—that the Court was fully aware of the same and made the same in the exercise of its own judgment upon the evidence thereon submitted to the Court, and there is no proof to show that the changes and alterations so directed were not just and proper, or any evidence to impeach the in-

954 tegrity of the same, or of the action of the Court, or of any of the parties thereto.

Finding 29 is contrary to the evidence, and the evidence is insufficient to support the same, in this, that there is no evidence to show that in making said changes and alterations, deductions or additions, any different mode of estimating the extent of the benefits or the value of the property taken was applied to the property of persons objecting, from that which was in said report applied to the property of other persons, or that the rules adopted in making such changes and alterations, were detrimental to any one, or were unfair or unjust, or that thereby the
965 burdens of any of the parties to said proceedings were unjustly or inequitably increased or affected, or that equality and equity and uniformity did not pervade all the changes and alterations made as well as the entire assessment, and there is no evidence to show that any different rule was applied in making the original report from that adopted in making the changes and alterations therein, or that the rule or principle adopted in making such changes or alterations were injurious to any person interested in said proceedings.

That finding 30 is contrary to the evidence and the
966 evidence is insufficient to support the same in this, that the evidence does show that there was a hearing upon the application therein mentioned and evidence adduced thereon and consideration had thereof.

Finding 31 is contrary to the evidence, and the evidence is insufficient to support the same in this, that there is no evidence to show that there was any arbitration between said Board of Dupont St. Commissioners and said Blythe to induce him to withdraw his objections or otherwise, or that said Dupont St. Commissioners at all arbitrated any of the matters in said find-

967 ing mentioned, or that said Commissioners were in any manner obligated to respect the action of said pretended arbitrators, or that in the action by them had or taken, they were influenced otherwise, or in any ways except in the exercise of their own judgment, or that there is anything in the evidence to show that in the action of said Commissioners touching the application of said Blythe, they were at all influenced by ought, save a sound exercise of their judgment and discretion, and the evidence shows that the plaintiffs, and all parties interested in said Dupont street, were aware of the objections of said Blythe, and of the action had thereon, and had all opportunity to contest the same, or take such action thereon as they might be advised; and there is no evidence to show that the action of said pretended arbitrators in the premises was other than advisory to said Board of Dupont Street Commissioners, and there is no evidence to show that there was any unfairness, inequality or injustice therein, or that the same was not just, fair and proper.

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Finding 32 is contrary to the evidence, and the evidence is insufficient to support the same in this, that there is no evidence to show that said Board of Dupont St. Commissioners speeded the making of their report, or the procuring of the confirmation of the same, through any alarm or apprehension of objections thereto, or for any improper motive or purpose, or to prevent any one from the exercise of their just rights touching the same, and the evidence shows that such final confirmation was not obtained without hearing or without notice to the parties affected thereby, but on the contrary, the evidence shows that all parties interested in said proceedings had full notice thereof, and such evidence touching the same was submitted to the Court as the parties deemed advisable, and the plaintiffs herein, and their

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970 predecessors in interest, had full notice of all action of the County Court touching the same.

Finding 33 is contrary to the evidence, and the evidence is insufficient to support the same in this, that there were answers to said petitions, and there was inquiry into, and discussion of the objections raised thereby, and proof taken thereon before said Court, touching the same, and hearing had thereon upon the merits thereof, and the purpose and object of said alterations and modifications were fully made known to the Court, and all evidence touching the same that
971 the parties deemed proper to submit to the Court was submitted, and the Court, in acting thereon, acted in regular judicial form with the same publicity, and in the same open and public manner that all other business conducted in said tribunal was conducted.

Finding 34 is contrary to the evidence, and the evidence is insufficient to support the same in this, that the evidence shows that counsel for plaintiffs herein were counsel for objectors in said finding mentioned, and that the action of said County Court was had upon the invitation, suggestion, argument and advice of such counsel,
972 and the plaintiffs herein and their predecessors in interest, and their attorneys, were fully apprised of all that transpired before said Board of Dupont Street Commissioners, and in said County Court, touching said objections, and all matters concerning the same, and they did consent directly and indirectly to all proceedings of said Commissioners and of said County Court touching all and singular matters in said finding mentioned, and the plaintiffs and their predecessors in interest not only consented thereto, but refrained from taking action against the same, because in the exercise of their right they deemed it for their best interests to secure the completion of said improvements at the earliest date with the least

973 litigation and the least expense possible, and the evidence shows that during all the time of the pendency of such proceedings that plaintiffs and their predecessors in interest were aware of the pendency of such proceedings; aware of the actions of said Board of Dupont Street Commissioners, and had visible before their eyes all that was taking place concerning the same, and that they urged and pressed the completion thereof themselves as for their best interests.

Finding 35 is contrary to the evidence, and the evidence is insufficient to support the same in this, that the
974 evidence shows that the plaintiffs and their predecessors in interest did consent to and acquiesce in said assessment; and that upon the trial of this action the counsel for the plaintiffs in open court withdrew and disclaimed all charges of any actual fraud in any proceedings in the widening of Dupont Street.

That finding 37 is contrary to the evidence, and the evidence is insufficient to support the same in this, that it does not show that all of said bonds were sold and disposed of, and the plaintiffs and their predecessors in interest have had the benefit of the proceeds of the same.
975 That such bonds were sold and disposed of to the parties acquiring the same in good faith for value, and in reliance upon the entire legality of the proceedings in and about the widening of said Dupont Street, and the final confirmation of such proceedings by said County Court, and the consent and acquiescence of all parties interested in or affected by said proceeding.

That finding 38 is contrary to the evidence, and the evidence is wholly insufficient to support the same, in this, that there was no evidence adduced on the trial of this action of any nature or character touching any of the matters in said finding mentioned.

976 That finding 39 is contrary to the evidence, and the evidence is insufficient to support the same, in this, that the evidence distinctly shows that all of the intervenors purchased and paid for said bonds in good faith, in open market, for the current market value thereof, and in full reliance upon the validity of the proceedings to widen said Dupont street, and upon the conclusiveness of the judgment of said County Court and said intervenors. Nor had any of them any notice of any alleged or pretended irregularities complained of in this action, and they and every of them believed, and were advised by counsel learned in the law, that the law under which
977 said bonds were issued, was constitutional and valid, and the proceedings had thereunder were regular, and the regularity and validity thereof, conclusively determined by the judgment of said County Court finally confirming the report of said Dupont Street Commissioners.

That finding 40 is contrary to the evidence, and that the evidence is insufficient to support the same, in this, that the evidence shows that said Board of Dupont Street Commissioners did lawfully acquire jurisdiction, and did legally and regularly pursue all steps prescribed in and by said Act of the Legislature, and that said County
978 Court did acquire lawful jurisdiction of the proceedings to widen said Dupont street, and that said County Court had exclusive jurisdiction of said proceedings, and that the judgment of said County Court thereon was final and conclusive in absence of the same being reversed upon appeal by the Supreme Court of this State.

And defendants further specify and assign as error committed by the Court on the trial of this action, that it appeared from the evidence that upon the face thereof, that the County Court of the City and County of San Francisco, had alone jurisdiction of the proceeding to widen said Dupont street; that upon the face thereof, the said

979 proceedings recited a full, strict and literal compliance with all the terms and conditions of said Act of the Legislature.

That under authority of said Act of the Legislature, bonds were issued and sold and disposed of to the public and third persons, who bought the same in good faith for the then current market value thereof, relying upon the regularity, legality and conclusiveness of the judgment of said County Court, and that as in favor of the parties so acquiring said bonds, and all persons claiming under them, evidence was wholly inadmissible to impeach or attack the regularity or validity of
980 said proceedings, or to show any secret vices therein that would affect the validity of the same; and the Court erred in allowing the regularity and validity of the judgment of said County Court to be impeached or affected by any such evidence, and the Court further erred in according such evidence any weight or effect so as to impair the jurisdiction, regularity, validity and conclusiveness of the judgment of said Court upon all parties interested in said proceeding, as against the holders of the bonds issued under and by virtue thereof.

In addition to this suit there are twelve other suits
981 pending in said Superior Court, instituted by and on behalf of all the property owners affected by the widening of said Dupont street, for the same purpose as this action—the pleadings of all of which *mutatis mutandis* are the same as the pleadings in this action, and upon the trial of this action it was agreed in open Court that two of said actions, to-wit: the present action and the case of Cornelius O'Connor *et al.*, plaintiffs, against the defendant Charles Tillson, Tax Collector, etc., should be tried as representative cases; that is to say, the present action of Lent *et al.* to represent the rights of the property owners on the east side of said Dupont street, and said case of O'Connor *et al.*, to represent the rights of the property

982 owners on the west side of said Dupont street, affected by the widening of said Dupont street.

The only additional evidence introduced on the trial of said case of O'Connor was:

It was shown by competent evidence upon such trial, that Cornelius O'Connor, ——— Ickeheimer, ——— Hobart, Donald McLea and N. Cousin, being some of the property owners on the west side of Dupont street, who, under the provisions of said Act of the Legislature, elected to take bonds instead of money for the damages awarded to them for damages done, or property taken in the widening of said Dupont street as aforesaid,
983 within about three months after receiving such bonds from said Commissioners sold such bonds.

ROBERT WATT, called by defendant, testified that he did not own the bonds received by him in lieu of money for damages, but held them on account of Richard Ivers; that Ivers (witness thinks) deposited the bonds with the Odd Fellows' Savings Bank.

G. W. OSBORN, called by defendant, testified that he did not receive any Dupont street bonds on his own account, but did receive 15 bonds as agent for another
984 party, and disposed of them.

WILLIAM KIBBE, called by defendant, testified that he received 48 bonds in lieu of damages, and still retained them.

It was admitted by counsel, that Hyam Joseph, Louisa M. Babcock, David Hunter and W. W. Young received bonds in lieu of damages.

And except as herein last stated the evidence upon the trial of both of said actions was the same, and the same objections, same rulings and exceptions were made upon the trial of both of said actions.

Inasmuch as the evidence, objections, rulings and

985 exceptions, as aforesaid, were the same in both of said actions, and the findings and final relief the same; in order to avoid unnecessary expense, it was, and it is hereby stipulated and agreed that this statement shall constitute the statement of the case upon motion for a new trial in both of said actions, and the statement on appeal to the Supreme Court in both of said actions, and this statement may be used upon motion for new trial of either of said actions, or upon appeal to the Supreme Court in either of said actions, with like force and effect as if the same had been regularly prepared, served, settled, certified and filed in each of said actions, and no
986 other statement or bill of exceptions shall be necessary upon motion for new trial or upon appeal to the Supreme Court in either of said actions.

McAllister & Bergin,
Attorneys for Defendant and Intervenors.

Service of within statement is hereby admitted, and all exceptions as to the time and manner of service is hereby expressly waived on this 25th day of May, 1882.

Garber, Thornton & Bishop,
Attorneys for Plaintiff.

Statement correct.

Garber, Thornton & Bishop,
987 Attorneys for Plaintiff.

Attorneys for Defendant.

The foregoing statement on motion for a new trial and on appeal is hereby settled and allowed.

M. A. Edmonds,
Judge.

Endorsed: Filed May 26th, 1882.

David Wilder,
Clerk.

By John M. Days,
Deputy Clerk.

988 [Title of Court and Cause.]

Order Denying Motion for New Trial.

FRIDAY, May 26th, 1882.

This cause came on to be heard this day on a motion for a new trial herein, the parties being present by their respective counsel, Messrs. Garber, Thornton and Bishop appearing for the plaintiffs, and Messrs. McAllister & Bergin for the defendants, and the said motion being submitted, and the Court being fully advised in the premises, it is ordered that said motion for a new trial be and the same is hereby denied.

989 Minute Book No. 1, Dept. 6, page 749.

[Title of Court and Cause.]

NOTICE OF APPEAL.

You will please take notice that the defendant and intervenors in the above entitled action hereby appeal to the Supreme Court of the State of California, from the judgment therein rendered, on the 14th day of May, A. D., 1881, and therein entered, in the said Superior Court,

990 on the 25th day of May, 1881, in favor of the plaintiffs in said action, and against said defendant and intervenors, and from the whole thereof; and also from the order made in said action on the 26th day of May, A. D. 1882, denying defendant's motion for a new trial. Dated this 14th day of June, 1882. Yours, &c.,

MCALLISTER & BERGIN,
Attorneys for Defendant and Intervenors.

To the Clerk of said Superior Court and
MESSRS. GARBER, THORNTON & BISHOP,
Attorneys for Plaintiffs.

991 [Endorsed:]

Filed June 14th, 1882.

DAVID WILDER,
Clerk.
By H. P. TRICOU,
Deputy Clerk.

Service and receipt of a copy hereof admitted after filing, this 14th day of June, 1882.

GARBER, THORNTON & BISHOP.
Attorneys for Plaintiffs.

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[Titl of Court and Cause.]

STIPULATION.

It is hereby stipulated and agreed, that the foregoing Transcript contains a full, true and correct copy of the Judgment Roll, Notice of Intention to Move for a New Trial, Statement on Motion for a New Trial of Defendant and Intervenors, Order Denying a New Trial, and Notice of Appeal in this cause; that the appeal was duly perfected, and that a good and sufficient undertaking on
993 appeal, in due form of law, has been properly filed.

That the foregoing is a full, true and correct transcript, and that this appeal may be heard thereon.

MCALLISTER & BERGIN,
Attys. for Appellant.
GARBER, THORNTON & BISHOP,
Attys. for Respondents.

994 [Title of Court and Cause.]

OPINION.

In bank. Appeal from Superior Court, San Francisco.

McAllister & Bergin and *D. M. Delmas* for appellants.

Garber, Thornton & Bishop for respondents.

TEMPLE, J. This suit was brought to enjoin the Tax Collector of the City and County of San Francisco from selling certain real estate, for the collection of the tax imposed for the payment of the Dupont Street Bonds, issued under the Act of the Legislature, approved March 23d, 1876, (St. 1875–76, p. 433.) That Act provided for
995 the widening of Dupont street, but was not to go into operation until the Board of Supervisors should declare by resolution or order that in their judgment it was expedient to widen the street in accordance with and in the mode prescribed by the Act. The Act specially defined the district benefited by the proposed improvement which should bear the burden of making it, to be assessed to the owners of land in proportion to the benefit received. The district was described as two separate parcels of land, being two strips—one on either side of the street—extending from Bush street to Market; the strip on the east side
996 in width extending half way to Kearny, and that on the west half way to Stockton—such streets being the parallel streets nearest to Dupont on the east and west. In case the Board of Supervisors expressed their judgment in favor of the improvement, the Dupont Street Commissioners named in the Act, to-wit, the Mayor, the Auditor, and County Surveyor, were to publish a notice in two of the daily papers printed in the City of San Francisco, informing property owners along the line of said street of the organization of the Board, "and inviting all persons interested in property sought to be taken or which would be injured by said widening, to present to the Board maps and plans of their respective lots, and

997 a written statement of the nature of their claim or interest in such lots." The Board was required to have an office in the city, and was furnished with a secretary, and allowed to employ clerks, attorneys, surveyors, draughtsmen, searchers of records, etc., and Section 7 of the Act defines with considerable particularity the duties of the Commissioners, and the mode of performing them. It is provided, however, that within 30 days after the publication of the notice of the organization of the Board the owners of a majority in value of the property fronting on the street may interpose their veto to the further prosecution of the work, which veto shall be final. If the pro-
998 ceeding was not thus arrested, the Board was to proceed, and, having completed the work of estimating damages and benefits, was to embody the result in a report, the precise nature of which is minutely defined in the Act, and which apparently, when so made, would give full and particular information of every determination of the Board which could affect the interest of any person. This report, when thus completed, was to be left "at the office of the Board daily during ordinary business hours, for thirty days, for the free inspection of all parties interested, and notice that the same is open for such time
999 and such place," to be published by the Board daily, for 20 days, in two daily newspapers printed and published in the city. At any time within this 30 days any person interested, who felt aggrieved by the action of the Board, could file in the County Court his petition setting forth his grievance, and the Court was empowered to approve the report, or to cause the same to be altered or modified, and finally to approve as modified. When the report was finally approved, the Board was to issue bonds of the city and county in a sum snfficient to pay the damages awarded, and all costs, the bonds to be paid by a tax on the district benefited. When the damages were all paid by the proceeds of the bonds, and the persons receiving

1000 the payments had conveyed to the city and county the lands taken, the Board was to remove the buildings and widen the street; and it was provided that the completion of the work "shall be deemed an absolute acceptance by the owners of all lands affected by this Act, and by their successors in interest of the lien created by this Act upon the several lots so affected. * * *"

The complaint avers that the work was actually performed, that is, that during the first seven months of the year 1877 the street was actually widened from 44 feet to 74 feet, by the removal of the buildings, and the turning of the same into roadway and sidewalk; that the bonds
1001 were sold, and the money thus obtained was used for the payment of the damages and costs; but it is claimed that money was expended improperly, and a large sum retained without just authority, for costs to accrue.

The objections to the proceedings are numerous, but may be included under the following: (1) The act is unconstitutional; (2) the Board of Commissioners had no power or jurisdiction to act because the Board of Supervisors did not properly express their judgment that it was expedient to widen Dupont street; (3) the notices required to be given to parties affected were never, in fact,
1002 given as required; (4) the Board was guilty of fraud and misconduct; and (5) the report, as confirmed, shows that the damages exceed the benefits.

1. It is claimed that the Act is unconstitutional on many grounds.

First. Because it is an attempt by the State to exercise the power of assessment for local improvements within the limits of a municipality. *People* vs. *Lynch*, 51 Cal., 34. In that case it was said of the statute there under consideration: "Such law is unconstitutional, because it is mandatory in its nature, and deprives the Board of Trustees * * * of all choice or discretion in reference to improvements." The Act in question does not

003 do that. It leaves the matter entirely to the local Legislature to say whether the work shall be done or not. True, if the Board of Supervisors concludes to order the work to be done, the Act designates the City officers who shall act as Commissioners. This power to act as a Board is given to such officers, and their successors in office. The mode of procedure is also prescribed. There is nothing unusual in this. Nor does it matter that the mode differed from that laid down in the Consolidation Act for inaugurating other improvements. But this question is not an open one. *People* vs. *Bartlett*, 67 Cal., 156, 7 Pac. Rep., 417; *Pacific Bridge Co.* vs. *Kirkham*, 64 Cal., 519, 2
004 Pac. Rep., 409.

Second. It is claimed that the Act is unconstitutional because it does not provide for due process of law.

1. It is claimed that the parties to be affected had a right to be heard upon the question whether the street should be widened or not, that the proceeding is judicial in its character,—is, in fact, a part of the proceeding to take private property for public use, to which the persons whose property is affected must be parties. There was no provision for such hearing. But it is plain that it is not a judicial act in that sense. It may be said to be
005 judicial in the sense that it is not ministerial. It is an Act which rests in the sound discretion of the authority. It may act or not, or may act in such mode as it may deem best, within legal limits, but it is not a determination by a judicial tribunal of the rights of parties before it. It is a Legislative Act, and the power to determine the expediency of a public improvement rests with the Legislature, or such local authorities as have been charged with the duty of determining the policy of the government in such matters. Some authorities from New Jersey are cited to the contrary, but the overwhelming current of decision is in accord with this view. Where compensation is provided for property taken, and persons in-

1006 terested are awarded an opportunity to be heard as to the amount, the constitutional requirement is satisfied. So, too, where a district is charged with an assessment for a local improvement, it is enough if the parties to bear the burden have a right to be heard as to the assessment before the lien becomes final upon their property. *Reclamation Dist.* vs. *Evans*, 61 Cal., 104; *In re Zborowski*, 68 N. Y., 88; *Holt* vs. *City*, 127 Mass., 408; *Pearson* vs. *Zable*, 78 Ky., 170; *Brewster* vs. *Syracuse*, 19 N. Y., 116; *People* vs. *Smith*, 21 N. Y., 595.

2. It is claimed that the Act does not provide for due process of law, because the notices prescribed are insuf-
1007 ficient. The notices provided for in the Act which are criticised under this head are the notice of the organization of the Board, and the notice that the report of the Board is open for inspection.

The sufficiency of the notice will depend, to a very considerable extent, on the nature of the proceeding, and the statute on which it is based. The statute is always presumed to be known, and whether the notice really affords the necessary information, and gives the party whose interests are affected an opportunity to be heard, must depend largely upon those provisions. It has been
1008 repeatedly held that proceedings for the levy and collection of taxes are not necessarily judicial, and that due process of law, as applied to such matters, does not require such notice as is considered essential to the validity of a judgment. In *Kentucky R. R. Tax Cases*, 115 U. S., 331, 6 Sup. Ct. Rep., 57, it is said: "Notice by statute is generally the only notice given, and that has been held sufficient. 'In judging what is *due process of law*,' said Justice Bradley in *Davidson* vs. *New Orleans*, 96 U. S. 97, 'respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suit-

able or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not *due process of law.*'" In other words, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand. And further, in matters of assessment and taxation, the same character of notice is not required as in ordinary actions in a court of justice; for the reason, I presume, that in such summary proceedings it is not practicable or usual.

Now, then, what are the circumstances of this case which have a bearing upon this question? Dupont street is one of the oldest streets in the City of San Francisco. That portion affected by this proceeding was in the heart of the city and had long been a finished street, the lots along it on both sides built upon and occupied. The district which it was alleged would be benefited was specifically defined in the Act. Kearny street had shortly before been widened by a proceeding somewhat similar, and the result had been to make the street more attractive. The tendency of business was westward, and Dupont street was the next parellel street. It was forty-four feet wide. It was not to any considerable extent a thoroughfare except for local purposes. There was not much reason for widening the street, which could interest the general public. But the case comes as near as can be imagined, to being one, in which it was a certain proposition, that the proposed improvement would be greatly to the advantage of the individual property-owners. The municipality and the general public, however, were obviously so little interested in the matter, that it would hardly be putting the matter too strongly to say that there was no decent pretext for the improvement except upon the hypothesis that the local property-holders desired it, and would be advantaged by it.

It is inconceivable that the matter should be passed

1012 through the Legislature without being a frequent subject of discussion among the lot-owners, even if it were not done at their instance. They had notice, not only as a rule of law which charges every one with knowledge of the Statute, but must have had such information as a fact, and also that in making the improvement the officials were acting, in a certain qualified sense, as their agents for their individual advantage, rather than for the public.

After the Supervisors had resolved that it was expedident that the street should be widened and the Board of Commissioners was organized, the whole proceeding 1013 could even then be stopped by a majority in value of frontage on the street. And when the work should all be completed the Act provides, as already recited, that the completion shall be deemed an acceptance by the lot-owners of the lien of the debt, as an absolute waiver of all claim upon the city for any part of the debt, and as a contract between such owners and the holders of the bonds issued under authority of the Act.

Under such circumstances it seems to me, the notices required are greatly helped out by the Act itself. The owners are, in a certain sense, parties to a proceeding, and are informed beforehand of the notices which will, 1014 or may be given, and of the purpose of them. They are informed minutely of the course of procedure, and the duty, in my opinion, is cast upon them of exercising a certain degree of diligence in regard to them. Having notice that the municipality would assume no part of the burden, and that when completed the entire cost would become a lien upon their property, and the bonds be considered as their individual contracts, they were put to their diligence to see that the Board faithfully performed its duties, at least to the extent that they could not afterwards complain of mere irregularities or of any misconduct on the part of the Commissioners which

1015 they could have had reviewed and corrected in the proceeding itself, *dum fieri.*

This, of course, if correct, does not obviate the necessity of notice, but I think it has an important bearing upon the issue as to the sufficiency of the notices provided, and, if I am right, it is unnecessary to mention particularly some objections to the statutory provision, which, I may venture to say, in such a view, seems almost trivial. Some of them, however, cannot justly be so characterized.

Among these are the objections that the notice is not required to be addressed to any one, that at the best it is
1016 only for those owning property fronting on Dupont street.

As already indicated, the notice must be read in the light of all the provisions of the Act. In *Boorman* vs. *Santa Barbara*, 65 Cal., 313, 4 Pac. Rep., 31, which is much relied upon by the respondents, the Act authorized the Mayor and Common Council, upon petition, to lay out, widen, etc., *any* street in the city, and directed them to give notice by publication in a newspaper of the time and place where they would proceed to examine the property to be affected. St. 1877-78, p. 777. This Court held
1017 the Act unconstitutional, because it did not sufficiently provide for notice. As it "provides for no notice at all addressed to any particular person or class of persons, or which would inform any particular person that on failure of appearance any burden would be imposed upon him or his property," the Court said: "It will be observed the Act neither fixes the boundaries of an assessment district nor authorizes the Common Council to fix them. * * * It is possible, if the Commissioners were authorized to fix the limits of the assessment district, finally or conditionally, in the first instance, and then to give notice—even by publication—to the owners of property within the district, the notice would be sufficient. But

1018 the Act provides only for notice, at most, to all property owners in Santa Barbara. Who can know that his property may by the Commissioners be deemed to be benefited?"

Plainly, that is not an authority against the sufficiency of the notice here. The authorities seem to be all, or nearly all, in favor of the proposition that when the limits of the assessment district are defined in the statute the notice need not be addressed to the persons whose property is affected by name; and certainly, in this particular case, we see no good reason for such a requirement. *In re Mayor*, 99 N. Y., 580; *City of Ottawa*
1019 vs. *Macy*, 20 Ill., 413. Nor was it necessary that the property sought to be taken or affected should be specifically described in the notice. As a whole, the property is so described in the statute.

The first notice prescribed in Section 6 was, in part, to inform property owners along the line of the street that the Board was then organized. The words, "property owners along the line of said street," as there used, are not the equivalent of the words, "owners of property fronting on said street." For the meaning of the language we must again refer to the statute. There we find the lands to be assessed for benefits described as two narrow strips
1020 on either side of the street, each fronting on and along the line of the street. For one purpose, no doubt, the notice was effective only as to owners of frontage; that is, to set the time running in which the owners of frontage might have stopped the proceedings; for it seems that only such persons could act in the matter. But it was also a notice to all persons interested that the proceedings were then pending, and that the Board, unless proceedings were arrested by the veto of the owners of frontage, would proceed with their labors.

3. Various objections are made to the notice prescribed in Section 7 of the Act. That provision is:

1021 "Such report, as soon as the same is completed, shall be left at the office of the Board daily, during ordinary business hours, for thirty days, for the free inspection of all parties interested, and notice that the same is so open for inspection for such time and such place shall be published by said Board daily, for twenty days, in two daily newspapers printed and published in said city and county." This must be construed to require the notice to be published as early as the first day of the 30 days during which the report was to remain for free inspection. Otherwise the notice could not truthfully state: "The report *is* open for inspection" for such time. It is
1022 said this is insufficient, because the 20-days publication of notice must come out of the 30 days, which would leave only 10 days for the parties to object; which would be an unreasonable period in which to require parties affected to make their objections. The idea that the notice only allows 10 days after notice seems to be derived from the practice concerning the service of summons. There the summons, when not personally served, may, under proper conditions, be sometimes served by publication for the two months, or such period as the Judge may direct. The law provides that the service shall be
1023 complete when the term of publication has expired, and the person served may have a certain number of days after service within which to appear and answer. But evidently that is a mere statutory arrangement, and the service would be just as effectual if the time for answering was made to expire with publication; provided a reasonable opportunity to be heard was afforded by the notice given. So here it would not matter if the publication were required to continue for the entire period of 30 days. It would be curious if the Court should hold that the notice would have been good if it had been published only 5 days of the 30, as was very nearly the case in *San Francisco* vs. *Certain Real Estate*, 42 Cal., 513, and bad be-

1024 cause it was required to be continued for 20 days. On
1 such principles there would have been no notice, though it were published for a twelvemonth, during all of which the report was open for inspection and objection.

Of course, unless the notice required can be helped out by reference to the Statute, it would amount to nothing. It is true it is not required to be addressed to any one specially. It informs no one what property is to be affected. It indicates no steps to be taken by the person aggrieved to obtain redress, and mentions no tribunal before which, or any time or place at which his grievance, if he have any, can be heard.

1025 But all this is provided for in the Statute. He has been already informed that this very notice will be so published and of all the steps he will be required to take to protect himself. The privilege afforded by the Statute to apply to the Court to fix a time for his grievance to be heard is as beneficial to him as though such time and place had been fixed by the notice.

The authorities upon all these questions of notice are exceedingly numerous, and apparently in some respects conflicting. Much of this apparent conflict disappears, however, when we remember that each case must be
1026 judged by its own circumstances and under the rule I have cited from the *Kentucky R. R. Tax Cases*, 115 U. S., 331, 6 Sup. Ct. Rep., 57. All the cases on the subject seem to be referred to by counsel, but I do not deem it important to cite or discuss them in this opinion. I call attention, however, to the numerous Statutes of this and other States quoted by counsel for appellants, which show that the mode here adopted is not strange or novel to judicial proceedings. It seems to me quite clear that there is no objection to the Act under consideration on the ground that it fails to provide for due process, so far as the matter of notice is concerned.

But it is contended, admitting that the notices were

1027 sufficient, no adequate hearing was awarded to the parties whose rights were affected.

So far as the claim that there ought to have been a hearing by the Commissioners before the assessment was made is concerned, the point has been settled in this Court by the case of *Reclamation District* vs. *Evans*, 61 Cal., 104, and by the *Kentucky Railroad Tax Cases*, *supra*, and in fact, by all the cases upon the subject.

Section 8 of the Act provides for a hearing before the County Court. Any person interested, feeling himself aggrieved by the action or determination of the Board, as shown in the report, might, at any time during the 30
1028 days that the report was to be kept for inspection, "apply by petition to the County Court, * * * setting forth his interest in the proceedings had before the Board, and his objections thereto, for an order on said Board requiring it to file with said Court the report of said Board, with such other documents or *data* as may be pertinent thereto, in the custody of said Board, and used by it in preparing said report. Said Court is hereby authorized and empowered to hear said petition, and shall set the same down for a hearing within 10 days from the date of the filing thereof." It then provides for service
1029 upon the members of the commission, that they may answer the petition, and appear by counsel in response thereto. "Testimony may be taken by said Court upon said hearing, and the process of the Court may be used to compel the attendance of witnesses, and the production of books or papers or maps in the custody of the Board, or otherwise. It shall be in the discretion of said Court, after hearing and considering said application, to allow said order or deny the same; and, if granted, a copy thereof shall be served on said Board, and it shall proceed to obey the same according to the terms of the order to be prescribed by the Court. * * * The Court shall have power to approve and confirm said report, or

1030 refer the same back to said Board, with directions to alter or modify the same in particulars specified by the Court, in the order referring the same back."

Now, it is argued, that after the person aggrieved has filed his petition, and a day has been fixed for the hearing, and the hearing had, witnesses summoned, books, papers and maps produced under the process of the Court, and counsel heard, and the Court is fully advised as to the grievances, all the Court can do in the matter, is to order the report to be filed; and even this, although affording no relief, is in the discretion of the Court. It is a proposition so often asserted by Courts, that perhaps
1031 now the question should be considered as closed; that the constitution is to be read in connection with laws of this character; and, if no hearing is expressly provided by the Statute, still, if the Constitution guarantees it, the Statute is to be properly construed so as to allow it, if possible, and not to deny it. The Constitution and the Statute will be construed together as one law. This rule was carried so far in *Neal* v. *Delaware*, 103 U. S., 370, that words denying the right were regarded as stricken out of the State Constitution and Statutes by the controlling language of the Constitution of the United States. *Kentucky R. R. Tax Cases*,
1032 115 U. S., 334, 6 Sup. Ct. Rep., 57.

We are not considering here a Statute which is silent as to the hearing. The provisions in question were undoubtedly inserted in view of the constitutional requirement, and for the purpose of affording that opportunity to be heard, without which the law would be void. To give the Statute the construction contended for would not only defeat the evident purpose, but would make the whole proceeding farcical. And I must confess, it seems to me, it requires great industry in going wrong, in view of all the circumstances, to conclude that such can be the meaning. Inapt words certainly are found in the section,

1033 but it would not have provided so elaborately for a thorough investigation of grievances if it was not intended that redress should be awarded. The Statute has apparently been patched and tinkered after it was first drawn, and incongruous matter injected into the body of it. But it still provides for a full hearing, and that the Court may alter and modify. And it seems that such action is to be based upon the hearing provided for. The word "discretion" is used in various meanings, but here, evidently, it was intended to submit the whole matter to the sound judgment of the Court, to be exercised according to the rules of law.

1034 The Statute does not expressly authorize the Court to pass upon the validity of the Act, or whether the Board of Supervisors had passed the necessary resolution, or the notices had been given. But the power to do this is necessarily involved in the power of the Court to act at all. It may be that the Court could not pass upon these questions upon which its jurisdiction depended, so as to conclude all inquiry even on a collateral attack. It was a Constitutional Court, invested with jurisdiction by the Constitution of special cases. The parties had full notice of the proceeding, and of their right to be heard. If to

1035 be heard upon such questions was a constitutional right, and the Constitution is to be read as a part of the law governing this procedure, as the authorities plainly hold, then the law must clearly be held to give the parties that right. In my opinion, however, the right is not doubtful under the Statute itself, independent of this proposition. The Statute places no limit upon the objections which might be made by those deeming themselves aggrieved by the action or determination of the Board as shown in the report. As all their determinations which could affect any person, were required to appear in the report, this would seem to include all possible objections. The determination, for instance, might have been objected to,

1036 because, the Act being invalid or the notices not having been given, the Board had no right to proceed to act at all. If this contention were sustained, the result would have been that the Court would not have confirmed the report, and the proceedings would have ended without fixing a charge upon the property of plaintiffs. They could have complained that a wrong basis was adopted in estimating damages or benefits; that the estimated cost was too much, or for any misconduct of the Commissioners which could affect them, or that the cost exceeded the estimated benefits, and it does not seem to me that the Court would have found any difficulty in granting relief.

1037 I do not regard the fact that the Commissioners were allowed to answer the petition of the aggrieved party as of any consequence. There was no occasion to require an answer at all. The provision was intended to prevent the matter from going by default, and to enable the Commissioners to aid the Court by such information as was in their power. This aid did not prevent any person interested from being heard, and if the Commissioners betrayed their trust in this matter, that of itself would have constituted a proper subject of complaint, which any one might have presented to the Court.

1038 The idea evidently was that there might be many complaints made by persons feeling themselves aggrieved. The Court was bound to hear all, and consider all competent and pertinent testimony offered. If any of the alleged grievances were found to be well founded, the report was to be ordered into Court. After all complaints had been duly heard, and the Court duly advised, the final order was to be made declaring what alterations and modifications were necessary. In this order, the Court was authorized not only to grant the specific relief asked for by the petitioners, but also to so modify the report in other respects so as to adjust the final determinations in regard to the assessments, to

1039 the report as altered at the prayer of the petitioners.

I concede at once the proposition, that to maintain this final order, it is necessary to hold that all persons whose rights were affected by the proceeding were before the Court. That the notice given under Section 7 of the Act, was a process by which they were brought into Court, and from that time on they were charged with notice of every thing done and of any step taken in the County Court. I think this is perhaps the most debatable point in the case, but the difficulty arises to great extent from a disposition to compare the opportunity here afforded with that deemed
1040 essential in ordinary judicial proceedings. Measured by that standard, it would unquestionably be deemed insufficient. But that cannot be accepted as furnishing the rule. "Due process of law," says Judge Cooley (Const. Lim., 356), "in each particular case means such an exertion of the powers of Government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Under a statute which authorized the Commissioner of
1041 Immigration to prevent paupers, criminals, lewd women, and certain others to land, certain women were detained, and on application to this Court on a writ of *habeas corpus*, it was adjudged that the Act did not violate the requirement of due process. Here there was no hearing provided by the Act at all. Any woman, if found on a vessel from a foreign port, was *liable* to be deprived of her liberty under circumstances most humiliating and degrading. This Court, speaking through Justice McKinstry, said: "The peculiar necessities which call for the action of the officer, and whether a power was exercised in the same manner prior to the adoption of the Constitution without being regarded a violation of the

1032 principles of *magna charta*, may be considered; and if it be found that like proceedings have always been recognized as constitutional in England and this country, and if the person who is subjected to them is accorded every reasonable opportunity to defend his individual rights which the nature of the case will admit—the case being one in which the end sought to be attained is lawful—a statute cannot be said to deprive a party of the benefits of due process of law." *Ex parte Ah Fook* 49 Cal., 406.

This conclusion was based partly upon the fact that the object of the law could not be attained unless the action under it was prompt and summary, precluding the possi-
1043 bility of according a hearing at an appointed time and place, and although it is not so stated in the opinion, perhaps to some extent, because the imprisonment, if it can be said that there was any, was so only in a qualified sense. They were only prevented from entering this State, but were not prevented from going anywhere else. This is an extreme case, no doubt, but it well illustrates, as all quarantine laws do, the proposition that the constitutional provision will not be given such effect as will render impossible laws, which are generally admitted to be essential to the safety and well-being of society, and
1044 that when usage and necessity both sanction it, the opportunity may be so limited as not to render the law inoperative.

The sufficiency of the opportunity to be heard accorded, must be ascertained in each case, not only by considering the adequacy of the opportunity to be heard, but the practicability of a more perfect and satisfactory hearing in the particular case, and if that which is provided, is such as the settled maxims of the law permit and sanction in such cases, and is reasonable in view of the necessities of the case, it is enough.

The practice upon this subject, so far as this particular question is concerned, seems to have been uniform. It

1045 has never been held, so far as I can find by any case really in point, that a new notice is necessary, or that parties whose individual assessments have not been altered, must be brought in and given a right to be heard as to other changes, no matter how much their individual burdens may be increased by such changes.

The precise question here raised has been often discussed: *Patterson* vs. *New York*, 1 Paige, Ch., 114, is directly in point. The Court said: "The notice to propose objections to the reports, is a sufficient notice to those who are satisfied with the original report to appear before the Commissioners and oppose any alterations
1046 which may be proposed by the persons objecting." To the same effect is *In re William St.*, 19 Wend., 680.

In *Gilbert* vs. *City of New Haven*, 39 Conn., 472, it is said:

"It is further objected that the defendant had no notice of the recommittal and of the subsequent proceedings. We are satisfied none was required. The whole matter, from the time of its first reference to the Board of Compensation to the time the report was finally adopted by the Court of Common Council, is one proceeding; the appellant was notified in the first instance, and appeared.
1047 If he neglected to attend the subsequent stages of the proceeding it affords no ground of complaint now."

Chamberlain vs. *Cleveland*, 34 Oh. St., 569, was a case very similar to this in the respect under consideration. It was held that after the notice, "all persons interested are bound to take notice of what is done up to the time the equalized assessment is confirmed." See, also, *Astor* vs. *Mayor*, 62 N. Y., 588; *Murray* vs. *Graham*, 6 Paige, 625; *Gates* vs. *Brooks*, 59 Iowa, 510; 6 N. W. Rep., 595, and 13 N. W. Rep., 640; *Avery* vs. *East Saginaw*, 44 Mich., 589, 7 N. W. Rep., 177.

That is all I deem it necessary to say upon the subject of due process of law.

1048 It is charged also that the Act is unconstitutional, because it was not competent for the Legislature to determine that the improvement would benefit the property owners, or would benefit them to the extent of the costs and damages. While I understand that this point is made by the learned and able counsel for respondents, it is fair to say that they have not much insisted upon the proposition in this form. They really claim that the Act directs the Commissioners to ascertain the benefits; that they did ascertain them and determined that the benefits would be less than the estimated cost of the improvement. In this, however, it is clear the counsel are in
1049 error. The Act only requires the Commissioners to estimate the benefit which will accrue to each lot relatively to the benefits to accrue to other lots. The Act certainly was not constructed upon the idea that the proceedings could be arrested by any possible finding in regard to benefits. Unless its final operation was made to depend upon such a finding it is difficult to see why there should be one.

Nor, in my judgment, did the Commissioners pretend to ascertain the amount of such benefits. The report as first filed showed benefits and costs exactly equal, being
1050 each estimated at $898,105.

It would have been marvelous if, upon a real estimate of the amounts, they should have come out exactly equal, considering the great number of properties. If, however, they had first ascertained the amount of the costs of the improvement, it would then have been easy to have distributed them proportionately upon the properties benefited. And this is evidently exactly what they did do.

If I rightly apprehend the position of counsel, they seem to think the validity of the law, in the first instance, and the jurisdiction of the Court or Commission which is to conduct the proceeding afterward, will depend upon the fact as to whether the property is benefited, and this

1051 fact must appear affirmatively in order to give validity to the proceeding.

But the power to assess for local benefits is not based upon the fact of local benefit in any other sense than all taxes are based upon supposed benefit to the tax-payer. The power of taxation is said by Chief Justice Marshall to be vested in the Government by all for the benefit of all. "The State taxes are based upon the theory that all are benefited by the Government which they are designed to support. And so of county and municipal taxation. And the Legislature may also organize smaller or differ-
1052 ent districts than these usual political subdivisions, and place upon such districts the burden of taxation for purposes in which the inhabitants have a special interest, or which will specially benefit the property within the district."

Now, in regard to general taxation, if a case were presented in which we could plainly see that the tax was not for the benefit of the Government, but was wholly for the private advantage of an individual, we should not hesitate to declare that it was not an exercise of legislative power, and the levy would be held void. The same rule and no other applies to assessments for local im-
1053 provements.

The main practical difference between assessment for a local improvement and general taxation seems to be, that in general taxation it is difficult and generally impossible for the Court to say that the purpose of the tax is not a public purpose, or that no benefit will result to the tax-payers, while in local assessments it is more often easy to see that the improvement will not be a special benefit. Still the benefit is not the source of the power. That is inherent in the Government and is only limited by express or implied limitations found in the Constitution, or by its own nature and purposes. With-

1054 in these limits the Legislature is the sole judge of when and to what extent the power shall be used.

It may be said that all the cases on this subject are exceptional, and many of them are cases of great hardship and clear extortion, in which the local benefit claimed is only a pretense to cover the unjust exaction, and the courts have often attempted to find some limitation in the nature of the power, which would enable them to prevent the injustice.

Thus it has sometimes been said that the power being based upon the supposed benefit, the burden cannot go beyond the actual benefit, which may be inquired into
1055 whenever the attempt is made to enforce the tax; but this, obviously, cannot be so. The Legislature must act, after all, in providing for the public good, upon the judgment of its members as to what is expedient or will prove beneficial. The most wisely planned projects often fail to realize the good expected. And then the benefits need not be immediate. I see no just limitation in this respect, except that the tax will not be upheld when the courts *can* plainly see that the Legislature has not really exercised this judgment at all, or that manifestly and certainly no such benefit can or could reasonably
1056 have been expected to result. The Judge should not place his mere opinion against that of the Legislature.

So, too, it has been said that as the tax is in this instance imposed by a power *ab extra*, it is taxation without representation. I find no such limitation upon the power in the Constitution, though if there were it might be questionable whether in this case there has been a violation of it.

These and some other limitations which courts have attempted to find in the nature of the taxing power, seem to me to be plain attempts to import into the Constitution restrictions which cannot be found there by any just reasoning.

1057 Judge Cooley, in his work on Taxation, 622, says: "The power to determine when a special assessment shall be made and on what basis it shall be apportioned is wisely confided to the Legislature and could not without the introduction of some new principle in representative government be placed elsewhere. We dismiss this topic, therefore, with the simple remark that with the wisdom or unwisdom of special assessments when ordered in special cases in which they are admissable at all, the Courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion."

1058 The power being in the Legislature the limitation upon it must be found in the Constitution either in express provisions or by implication, and there exists, which must be recognized by the Courts, the same presumption that the law is within legislative power that applies to any other Statute. That is, the law will not be declared unconstitutional unless it plainly appears to be so. Therefore, it is presumed that the power of assessment existed and the contrary must be very clearly made to appear before the Court could declare the law invalid. It does not so appear in this case.

1059 But it is contended, admitting that the law is valid, the Board of Supervisors did not authorize the work to be done by expressing their judgment that such improvement would be expedient. March 27th, 1876, the Board passed a resolution which fully satisfies the Act. The proceeding was not conducted under the Consolidation Act. The Statute is complete in itself and it prescribes no preliminary notice. It furthermore expressly authorizes the Board to express such judgment in such form as they might deem advisable. Counsel say this has reference only to the language in which the judgment should be expressed. Since the Board could not express its judgment at all

1060 without choosing the language, that construction is not tenable.

It is objected that the notices were not duly published because sometimes printed in the supplements. The supplements, however, in this particular instance, were part and parcel of the newspaper itself. They constituted only a third sheet when there was too much matter for the usual 2-sheet issue. Why they were designated as supplements I do not know, nor does it matter. The mere fact that the word supplement was printed at the head could not change their character. I have looked in vain for any evidence to sustain the finding that the
1061 so-called supplement was not circulated co-extensively with the balance of the paper. All the evidence upon the subject is the other way.

If I am correct in my conclusions as to this point, the remaining objections do not require much consideration.

That the benefits as shown in the report are less than the cost of the improvement has been already sufficiently noticed. If the intervenors in their cross-complaint have improvidently admitted the construction of the Act contended for, it will not help the plaintiffs. It cannot change the meaning of the law or the legal effect of the
1062 finding. If there was a valid law authorizing the improvement, and the Board was authorized to act and the County Court obtained jurisdiction, the plaintiffs cannot complain here of mere irregularities, or bad conduct on the part of the Commissioners, for which that Court could have afforded relief. The alleged frauds were all such as by the exercise of a proper diligence ought to have been known by the interested parties in time to present to the County Court. This action is by the property owners on the east side of the street—the property taken was immediately opposite. It is averred that the Commissioners, willfully and intentionally, determined the value of lots taken to be more than three times as much as they

1063 in fact were, and omitted from their estimate of benefits to the same lots about two-thirds of the actual benefit. This over-estimate of damages and under-estimate of benefits, so far as I can judge from the statement of the case in the record, seems to be fully sustained. But the report showed fully what the estimates were, and the injustice was so obvious that a mere inspection by those familiar with the property, as the plaintiffs were, could not fail to disclose the fact. As to the interest of Bryant, one of the Commissioners, I find no evidence of it except the admission in the cross-complaint that he had for seven or eight years owned the undivided half of a cer-
1064 tain lot on the northeast corner of Dupont and Morton streets, which fact appeared upon the maps and reports made by the Commissioners.

But admitting the validity of the Statute and that the preliminary steps were taken, which authorized the work to be done, the plaintiffs cannot now maintain this action. The Statute, as I have already stated, manifested very plainly that the improvement was to be made, for their special benefit, and that they were to bear the entire cost. They were afforded an opportunity, even after the Board was organized, to arrest proceedings, if a majority in
1065 value of frontage should be of opinion, that it would not be to their advantage, and were distinctly notified that if they permitted it to be completed, their acquiescence would be deemed an absolute acceptance by them of the lien created by the Act. Under such circumstances they could not remain silent and permit the money obtained of the bondholders to be expended in the improvement of their property and then escape liability on the plea that the officers charged with the work, who were in a sense their agents, were guilty of misconduct and fraud, which they by proper diligence could have prevented.

The pleadings and the briefs are full of the most positive charges of fraud and corruption against the Commission-

1066 ers, and although apparently hurled at the Board, they are constantly put forward as though the bondholders were in some way responsible for them. They represent themselves as victims who should be relieved at the expense of those who were induced by their former silence to loan the money to improve their property. There was fault and culpability over and above that of the Board which is charged with the perpetration of the frauds. The culpability is on the part of the lot owners who remained silent while the bondholders were advancing the money to their agents, and it was being expended by them for their benefit. I see no reason why the Legis-
1067 lature might not declare, by a law before the fact, that such remissness shall constitute an estoppel. Certainly, under such circumstances, a Court of equity would not lend its aid to the plaintiffs. Authorities are not wanting on this point, many of them going much further than this Court is prepared to go. They fully sustain the proposition, however, that it is competent for the Legislature to declare that the tacit acquiescence of parties interested and their failure to challenge proceedings while in progress, will estop them from questioning them after they are completed. That they cannot accept the bene-
1068 fits and avoid the burdens.

In *Palmer* vs. *Stumph*, 29 Ind., 329, an assessment was laid for the improvement of a street, under a statute which provided for an appeal, but declared that no question or act shall be tried which may arise prior to the making of the contract. The Court held that the plain intent was that the owner should not remain silent until he had secured the full benefit ot the work, and then avoid payment. It is said: "If he denies the power of the Council to order the improvement, he must test the question by injunction before the work is done. Acquiescence in the action of the Council is by law made to estop him from going behind the making of the contract."

1069 The same statute was under consideration, and the same ruling made, in *Commissioners Allen Co.* vs. *Silvers*, 22 Ind., 491. See also, *Quinlan* vs. *Myers*, 29 Ohio St., 500; *State* vs. *Wertzel*, 62 Wis., 184, 22 N. W. Rep., 150; *People* vs. *Common Council*, 65 Barb., 9; *State* vs. *Mayor*, 40 N. J. L., 244; *Kellogg* vs. *Ely*, 15 Ohio St., 64; *Pittsburg* vs. *Scott*, 1 Pa. St., 309; *Patterson* vs. *Baumer*, 43 Iowa, 477; *Weber* vs. *City of San Francisco*, 1 Cal., 455.

I think the cause should be remanded, with directions to dissolve the injunction and dismiss the complaint. So ordered. TEMPLE, J.

We concur:

1070 SEARLS, C. J.
THORNTON, J.,
MCFARLAND, J.

CONCURRING OPINION.

I concur in the order of judgment directing the Court below to dismiss the complaint.

1. If there were irregularities in the proceedings to widen Dupont street, which did not deprive the plaintiffs of opportunities to contest them, they should have been
1071 objected to in the course of the proceedings. If the statute is a valid statute, but it appears from the record that there were omissions, defects or departures from the procedure prescribed by the statute, which render the assessment of the Commissioners, or judgment of the County Court invalid, for want of jurisdiction of the persons or property of the plaintiffs, each of the plaintiffs had a plain, speedy and adequate remedy at law, by means of the writ of *certiorari*. *Ewing* vs. *City of St. Louis*, 5 Wall., 413; *S. V. W. Co.* vs. *Bryant*, 52 Cal., 132; *People* vs. *El Dorado*, 8 Id., 61; *People* vs. *Board of Delegates*, 14 Cal., 479.

1072 2. And so, if the assessment or judgment is void because of the invalidity of the statute, each of the plaintiffs could have resorted to *certiorari*. Moreover, if the Act of March 13, 1876, is unconstitutional and void, as contended by counsel for respondents—a sale of the lands assessed, and the Tax Collector's deeds thereof, would constitute no cloud on the title of the plaintiffs. An injunction will not be issued to restrain the collection of a tax or assessment by the sale of real property, unless it appears that the plaintiff would suffer irreparable injury, or an injunction is necessary to prevent a multiplicity of suits, or the sale would cast a cloud on his title. *Dean*
1073 vs. *Davis*, 51 Cal., 407; *Houghton* vs. *Austin*, 47 Cal., 647; *Savings and Loan Society* vs. *Austin*, 46 Cal., 448; *Wiggin* vs. *Mayor*, 9 Paige, 23; *Dows* vs. *City of Chicago*, 11 Wall., 104; *Central P. R. Co.* vs. *Corcoran*, 48 Cal., 65. When a statute gives to a tax deed, the tax being levied by a valid law, effect as evidence *prima facie* of the regularity of the assessment, and of all proceedings under it, the deed may create a cloud. *Palmer* vs. *Boling*, 8 Cal., 384; *Bucknall* vs. *Story*, 36 Cal., 73; *Potter* vs. *Greene*, 13 Cal., 328; *High* vs. *Shoemaker*, 22 Cal., 372; *People* vs. *Crockett*, 33 Cal., 157. But whatever effect the Legislature may at-
1074 tempt to give to a tax or assessment deed as evidence, every such deed must be read with the statute under which it purports to have been issued, and if the statute is void, the deed issued under it can cast no cloud on the true title.

3. At a very early day in the judicial history of this State it was held where an assessment was laid for improving a street, thereby benefiting the property of the plaintiff in common with the property of other persons, and the improvement was completed without the plaintiff's interposing to prevent it, an injunction to prevent the sale for the assessment was properly denied, on the ground that he who seeks equity, must do equity; and

1075 that the city should be permitted to proceed and sell the plaintiff's land, leaving him after the sale to the technical rights which he set up in his bill. *Webber* vs. *City of San Francisco*, 1 Cal., 455. I know of no case in which the doctrine of that case has been expressly overruled, or overruled by necessary implication. And while there is some conflict in the decisions of the Courts of the several States with reference to the conditions under which equity will interpose to enjoin the sale of lands for assessments, there is ample authority to uphold the view taken by the Supreme Court of this State in *Webber* vs. *San Francisco*. "One of the first of these" (equitable
1076 principles) "is that parties coming into equity must do equity. * * * If parties cannot come into equity without submitting to do equity, *a fortiori*, they cannot come for the summary interference of the Court when their conduct before coming has been such as to prevent equity from being done." Per Turner, L. J., *Great West R'y* vs. *Oxford*, 3 De G. M. and G., 359. Here the plaintiffs, with full knowledge of what was done by the officers and others under color of the statute—for the contrary is not alleged, found or proved—with full knowledge of all the acts of which they now complain as wrongful and un-
1077 lawful, remained quiescent until they had received the benefits of the work. The Legislature had declared that their lands would be benefited, and there is nothing in the record to indicate that their lands were not, in fact, benefited to the full amount for which they have been or will be assessed. When the complaint was filed, valuable buildings belonging to many different persons may have been removed or destroyed, and the work of widening the street had been completed at very great expense. So far as appears, while great loss and injury to others would be the consequence of an injunction herein, the plaintiffs will suffer no real injury by a denial of an injunction. Under these circumstances, I think it clear

1078 that the plaintiffs so far acquiesced in the work of widening the street and the issue of the bonds as that they should have been denied an injunction decree. *Lux* vs. *Haggin*, 10 Pac. Rep., 694; and cases there cited.

Where the County Commissioners contracted for the building of a bridge without legal authority, and the bridge was completed, it was adjudged that payment for it could not be enjoined at the suit of a tax-payer. *Clark* vs. *Dayton*, 6 Neb., 193. When an improvement had been made along a public street, to which the owner of property abutting thereon had made no objection until after
1079 its completion, upon a bill being filed by him to enjoin the assessment for want of notice, it was held he must do equity by paying the amount which his property was benefited. *Barker* vs. *Omaha*, 16 Neb., 269, 20 N. W. Rep., 382. In Indiana the doctrine has been carried further, and it is settled that a property owner cannot quietly permit money to be expended in a work which benefits his land under a contract with a city, and then deny the power of the city to make the contract. *Palmer* vs. *Stumph*, 29 Ind., 329; *Hellenkamp* vs. *La Fayette*, 30 Id., 194; *City of La Fayette* vs. *Fowler*, 34 Id., 146.

1080 4—It may be urged, however, that equity should entertain jurisdiction of a suit like the present, "to prevent multiplicity of actions." The multiplicity of actions which it may be said (although in the absence of averment) the complainants here seek to avoid would not injuriously affect any one of them. Cooley on Tax., (2 Ed.) 771; *Dodd* vs. *Hartford*, 25 Conn., 232. But, if that be not the true rule, and a bill may be filed by many persons to enjoin sales of the separate property of each for the same assessment; if the only necessary community of interest among the plaintiffs is in the questions at issue to be decided by the Court—"in the mere external fact that all their remedial rights arose at the same time,

1081 are of the same kind, involve similar questions of fact, and depend upon the same questions of law" (1 Pom. Eq., Sec. 260)—the question still remains: Will a suit be entertained to prevent multiplicity, when it appears that no one of the plaintiffs could separately demand equitable relief? The cases sometimes supposed to do so, do not when examined answer the foregoing question in the affirmative. *Kennedy* vs. *City of Troy*, 14 Hun., 308, and *Clark* vs. *Village of Dunkirk*, 12 Hun., 181, were cases in which it was held that, when an assessment is invalid, but such invalidity is shown only by matters *dehors* the record, which in itself is in all respects regular and with-
1082 in the power and jurisdiction of the authority laying the same, an action in equity may be maintained by any one, upon whose real estate an apparent lien has been created by the assessment on behalf of himself *and others in like situation*; but to justify such an action it must be alleged in the complaint that the assessment is regular upon its face, and apparently in accordance with the provisions of the law authorizing it. In *Ireland* vs. *City of Rochester*, 51 Barb., 435, the Supreme Court said: "The assessment being void as to the plaintiffs, their right to maintain this action is clear, not only to avoid a multi-
1083 plicity of suits, but to remove a cloud from their respective titles;" citing 14 N. Y., 534. The case referred is to *Heywood* vs. *City of Buffalo*, 14 N. Y., 535. That was a suit by a single plaintiff, and the decision was: When an action was brought to restrain the collection of and annul an alleged illegal assessment, which, if legal, was a lien on the plaintiff's real estate, but the complaint did not show but that its invalidity appeared on the (face of the) proceedings imposing it, on demurrer to the complaint, held the action could not be maintained. And in *Scofield* vs. *Lansing*, 17 Mich., 437, the Supreme Court of Michigan held that when by the provisions of a city charter a tax was declared to be a lien on premises, it

1084 constituted a cloud on the title. In these cases each of the plaintiffs could have claimed separately (as was held by the Courts of New York and Michigan) the aid of equity to remove a cloud from his title, as well as have maintained his action or defense at law. In some of them the plaintiffs were permitted to join as plaintiffs in an equitable suit, because the title to their respective tracts of land was affected by the same cloud, created by the same proceedings.

Even if there are cases in which each of the several plaintiffs would not be allowed to maintain a separate suit in equity, but yet all would be entitled to unite in
1085 one suit for the determination of questions which might arise in separate actions at law, the result herein must be the same. The plaintiffs, by their acquiescence and consent, having lost their right to ask the aid of equity by injunction, the Court ought not to have granted to all that which it should refuse to each. To grant the injunction to all because each may be subjected to a separate action at law is to reward the laches and neglect which has deprived each of his right to seek the equitable relief. The acquiescence which estops the plaintiff from obtaining an injunction is in the nature of a defense in equity, and by holding all estopped by such acquiescence, it is
1086 not necessarily held that the plaintiffs were improperly united as plaintiffs—whether they were united to prevent multiplicity of actions or for any other reason. It is simply to say that none of the plaintiffs are entitled to the preventive decree. McKinstry, J.

DISSENTING OPINION.

I think the judgment should be affirmed. I assent to some of the propositions advanced in the leading opinion, but the statute and proceedings in controversy are

1087 in many respects, it seems to me, plainly violative of that clause in the constitutional declaration of rights which says, "No person shall be deprived of * * * property without due process of law."

1. That the Act itself should provide for "due notice" to the property owner and afford him an opportunity to be heard, is settled beyond all controversy, and whatever may be the conflict of opinion upon the question of what is "due notice," there can be no question that it should be notice of a full hearing as to time, place and liability. Section 7 is the only provision which assumes to satisfy this requisite, but it provides no notice at all.
1088 It affords no notice of a hearing, and none was given. It provides for a notice after assessment is complete, that the report "is open for inspection." It is true Section 8 attempts to give any person dissatisfied with the report a hearing upon petition before the County Court—which Court could not, under Sections 6 and 8, Article VI of the old Constitution, be clothed with jurisdiction of any case involving the title or possession of real property—but it is only by implication, if at all, that the Court could aid him, the language of the statute being:

"It shall be in the discretion of the Court, after
1089 hearing and considering said application, to *allow* or *deny* the same." As to those, however, who were satisfied with the report, which had been left "open for inspection," there is no hearing provided, although the Court is given in such cases absolute power to fix values and assess damages of its own motion and according to its own rules and estimates—notwithstanding the report of the Commissioners, with which the owner may be content. The following is the concluding portion of Section 8: "But in case no such petition shall be filed with said County Court within the time above limited for the filing thereof, the said report shall be presented by the said Board to the said County Court, with a petition to the

1090 Court that the same be approved and confirmed by the Court. The Court shall have power to approve and confirm said report, or refer the same back to said Board, with directions to alter or modify the same in the particulars specified by the Court in the order referring the same back, and thereupon the said Board shall proceed to make the alterations and modifications specified in the order of said Court. The alterations and modifications aforesaid being made, the report shall be again submitted to the said Court, and if the Court, upon examination, shall find that the alterations and modifications have been made according to the directions contained in
1091 said order, the Court shall approve and confirm the same by an order to be entered on its minutes; but if the said Board shall have neglected or failed to make the alterations and modifications set forth in the order of reference, the Court may again refer the report back to said Board, and so on until its original order of alteration and modification shall have been complied with by said Board, and the said Court shall then approve and confirm said report." (St. 1875–76, p. 436, Section 8.)

Of course, if we can say that the citizens of the State are charged with notice of all the Acts of the Legislature affecting their private interests and must be on the
1092 alert to prevent fraud in the carrying out of the work provided for, the objection just considered is not well taken, but that would be equivalent to saying that "notice" and "opportunity to be heard" are not essential elements of "due process of law."

2. We might be able to overlook the defects referred to if it were clear that the parties whose property was affected had, as matter of fact, due notice and substantial hearing; but as I read the record such is not the case here. Many of the orders seem to have been made *nunc pro tunc* in regard to the time for hearing. Several of the petitions were set for hearing on December 8th. On

1093 that day no orders were made; nothing was done until December 15th, when they were continued to December 18th. On December 19th the whole matter was continued and set for hearing December 22d. Thereafter *and without further notice or opportunity to appear*, the Court, on an *ex parte* motion, took up the case, and finally disposed of the matters before it—two days before the day set for regular hearing. These interesting, if not suspicious facts, appear on the face of the Court's records, and in ordinary cases would not support a judgment. *Tompkins* vs. *Clackamas*, 4 Pac. Rep., 598.

3. The report and judgment show that the assess-
1094 ment was for about $100,000 in excess of the benefits. If I understand the authorities on this proposition, a statute which imposes an assessment in excess of special benefits is unconstitutional. *Davidson* vs. *New Orleans*, 34 La. An., 170; *Taylor* vs. *Palmer*, 31 Cal., 254; *Creighton* vs. *Mason*, 27 Cal., 624; *In re Market St.*, 49 Cal., 549; *Chicago* vs. *Larned*, 34 Ill., 203.

It may be admitted that the Legislature had the power to declare the benefit, but I fail to find any declaration of that kind in the Act referred to. It is true the Act speaks of "the district hereinafter described as benefited
1095 by said widening," but there is no direct finding of the fact of benefit therein by the Legislature; on the contrary the Board of Commissioners are therein directed to ascertain and fix the extent of damages and benefits "according to the judgment of the Board." Section 7.

4. The bond-holders stand in no better position than the municipal authorities. The bonds are not general or ordinary municipal bonds issued for the benefit of the general fund. They are payable out of a special fund raised by special tax on a small district. They do not show on their face that the Act has been complied with —which is essential even if the Act referred to be valid— and consequently they are not negotiable so as to cut off

1096 the defenses claimed. *Carroll Co.* vs. *Smith*, 48 Reporter, 33; *Williams* vs. *Roberts*, 88 Ill., 11; *Cagwin* vs. *Hancock*, 84 N. Y., 532; *Craig* vs. *Anders*, 93 N. Y., 405; *Lyons* vs. *Chamberlain*, 89 N. Y., 585.

PATERSON, J.

[Title of Court and Cause.]

CERTIFICATE OF CHIEF JUSTICE.

1097 In this cause the judgment of the Superior Court of the City and County of San Francisco having been reversed, it is now certified that in this suit and appeal, there was drawn in question the validity of the Statute of the State of California, entitled, "An Act to authorize the widening of Dupont Street in the City and County of San Francisco," approved March 23d, 1876, on the ground of its being repugnant to the Fourteenth Amendment of the Constitution of the United States, and that the said decision of this Court was in favor of the validity of said Statute.

1098 There was also drawn in question the validity of an authority exercised under said Statute, by the Commissioners, County Court and Tax Collector, mentioned in the pleadings and findings herein, in making, confirming and enforcing the report and assessment set forth in said pleadings and findings;—on the ground of the repugnancy of said authority and its said exercise to the said Fourteenth Amendment, and the said decision of this Court was in favor of the validity of said authority and the said exercise thereof.

And the said Statute, and the said exercise of authority by the said Commissioners in making, and the said County Court in confirming, the report and assessment mentioned in said pleadings and findings, having been held

1098 valid, binding, and conclusive by this, the highest Court in the State of California, in which a decision of this suit could be had, notwithstanding such objections, this certificate is ordered to be made part of the record.

By order of the Court.

NILES SEARLS,
Chief Justice of the Supreme Court
of the State of California.

Dated July 8th, 1887.

1099 [Title of Court and Cause.]

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America:

To the Honorable, the Judges of the Supreme Court of the State of California—Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of California, before you, being the highest Court of law or equity of the said
1100 State, in which a decision could be had in the said suit of W. M. Lent, H. Epstein, D. C. McGlynn, Joseph Musto, Dashaway Association, C. Dall, J. C. Collins, J. McCabe, J. N. Staud, Edward Newman, Unitarian Church, Peter Abrahamson, D. V. Koopmanschap, C. F. Fargo, Fred. Hellwig, G. L. Bradley, Samuel Schweitzer, Edward Barron, Wm. Casar, F. Scherr, F. Staud, F. Phillips, Dennis Magner, L. Carriveau, plaintiffs and respondents, in said Supreme Court of California, and Charles Tillson, Tax Collector of the City and County of San Francisco, defendant and appellant in said Supreme Court of California, and D. O. Mills, University of California; Jacob

Rosenberg, Charles Lux and Joseph Rosenberg, executors of the last will of Michael Reese, deceased; William A. Piper and Charles F. MacDermot, intervenors and appellants in said Supreme Court of California, wherein was drawn in question the validity of a statute of said State of California, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity; and wherein was also drawn in question the validity of an authority exercised under said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of the validity, a manifest error hath happened, to the great damage of the said W. M. Lent, H. Epstein, D. C. McGlynn, Joseph Musto, Dashaway Association, C. Dall, J. C. Collins, J. McCabe, J. N. Staud, Edward Newman, Unitarian Church, Peter Abrahamson, D. V. Koopmanschap, C. F. Fargo, Fred. Hellwig, G. L. Bradley, Samuel Schweitzer, Edward Barron, Wm. Casar, F. Scherr, F. Staud, F. Phillips, Denis Magner and L. Carriveau, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, on the second Monday of October next, in the said Supreme Court of the United States, to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Morrison R. Waite, Chief Jus-

1105 tice of the Supreme Court of the United States, this eighth day of July, in the year of our Lord eighteen hundred and eighty-seven, and of the independence of of the United States the one hundred and twelfth.

L. S. B. SAWYER,

Clerk of the United States Circuit Court, northern district of California.

By F. D. MONCKTON, Deputy Clerk.

[Seal of the Supreme Court of the United States.]

The above writ of errors is hereby allowed, with a stay of proceedings on the judgment.

1106 STEPHEN J. FIELD,

Justice of the United States Supreme Court.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Afterwards, to-wit: on the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, come the said plaintiffs in error by John 1107 Garber, their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, that:

I.

That by the record herein it appears that the sale sought to be enjoined will deprive the plaintiffs in error of their property without due or any process of law; and that the assessment which it is threatened to enforce was made secretly, fraudulently, *ex parte*, and contrary to law and the Statute of California, entitled, "An Act to authorize the widening of Dupont street, in the City and County of San Francisco," and was and is unjust and

1108 excessive, and will confiscate the property assessed; and that said defendants have never had any day in Court or opportunity to set up their defences against said imposition and assessment, and that if the final judgment of the Supreme Court of the State of California herein be not reversed, the property of the defendants will be taken and incumbered without due process of law.

II.

That the Supreme Court of California erred in holding and deciding that the confirmation of the County Court
1109 was valid aud binding and precluded all the objections urged to said assessment and to the report as confirmed; whereas, as appears by the record herein, the only notice and opportunity for a hearing provided by or permissible under said Statute, is that prescribed and given in and by Sections 7 and 8 thereof, and the same would not have constituted due process of law, even if followed and allowed in good faith; and by reason of the frauds committed by the Commissioners and set forth in the findings of the Superior Court, and the fact as also shown by said findings that said County Court did not proceed judicially, but denied and rendered impossible even the
1110 limited opportunity for hearing given by the Statute, said assessment and confirmation were void as made and had without due process of law.

III.

That said Supreme Court of California erred in deciding that the plaintiffs in error, upon the facts had by said findings, had legal and due notice and sufficient opportunity to be heard before said County Court upon all objections which they were entitled to raise to the validity of said assessment and of the report of the Commissioners, as modified and confirmed, and upon all objections

1111 which existed thereto as to the validity of said Statute; whereas, the said Statute did not provide for due or any notice, or for appropriate, fair, or other opportunity to be heard upon any of said objections or defences, and as to all of their objections and defences, they had no notice and no opportunity to be heard and no day in Court; and said report was allowed to be made, modified, and confirmed, without notice or opportunity to be heard.

IV.

That said Supreme Court of California erred in deciding that the plaintiffs in error were not entitled under and
1112 by the Fourteenth Amendment to the Constitution of the United States to such opportunity to be heard and to present their claims and defences in said County Court, as is essential in ordinary judicial proceedings, whereas said amendment does secure to them the opportunity essential in ordinary judicial proceedings before it can be finally determined against them said assessment was not fraudulently made to their injury, or that a false rule was not intentionally adopted and applied by the Commissioners, or that said Commissioners were not interested and judges in their own cause, or that said Statute was
1113 not unconstitutional, or that said assessment was not rendered void by reason of said objections, or that said Statute was complied with and the authority attempted to be conferred thereby duly exercised, or that said County Court proceeded judicially in all things, or that their property was benefited, or benefited to the extent of the burden imposed.

V.

That said Supreme Court of California erred in deciding that the Legislature had the power to declare that the property of the plaintiffs in error was benefited to the extent of the assessment afterwards to be made, and that

1114 they were not entitled to any hearing upon that question and had no right to a judicial decision thereof; whereas the same is a judicial question upon which they had a right to be heard.

VI.

That said Supreme Court of California erred in deciding that the plaintiffs in error had no right to notice or opportunity to be heard before the Board of Supervisors decided on the expediency of widening the street in question or whether the same should be widened.

1115

VII.

That said Supreme Court of California erred in deciding that said Statute awarded, and that there was an adequate hearing and opportunity to be heard; whereas neither the hearing and opportunity awarded by the Statute nor that had amounted to due process of law, or was appropriate to the cases, or just to the parties to be affected, or was pursued in the ordinary mode prescribed by law, or was adapted to the end to be attained, or gave to the plaintiffs in error an opportunity of being heard respecting the justice of the confirmation.

1116

VIII.

Said Supreme Court of California erred in deciding that the confirmation by the County Court was valid, binding and conclusive, notwithstanding it appears on the face of the report so confirmed, that the burdens imposed were far in excess of the benefits, as determined by the Commissioners and the County Court.

IX.

That said Supreme Court of California erred in denying the petition of the plaintiffs in error for a rehearing.

1117 X.

That said Supreme Court of California erred in not deciding that the said Statute, entitled, "An Act to authorize the widening of Dupont Street in the City and County of San Francisco," was unconstitutional and void by reason of its repugnancy to the Fourteenth Amendment to the Constitution of the United States, and as taking and incumbering the property of the plaintiffs in error without due process of law, and denying to them the equal protection of law.

XI.

1118 That said Supreme Court of California erred in not deciding that the assessment in question was not a tax, but was an arbitrary imposition, made without due process of law, and constituting a taking of property without compensation; and not levied with any pretense of uniformity, apportionment or equality, and that said Statute was an attempt to impose a tax or assessment without representation, to and upon a few persons arbitrarily selected, and without compelling all those benefited to contribute.

XII.

1119 That said Supreme Court of California erred in not deciding that the action of the County Court was invalid, and the confirmation a nullity as repugnant to the Fourteenth Amendment to the Constitution of the United States upon the facts as shown in Finding No. 32 of the Superior Court.

XIII.

The Supreme Court of California erred in upholding the validity of said Statute, entitled, "An Act to authorize the widening of Dupont Street in the City and County of San Francisco," and in not deciding that the same was

repugnant to the Fourteenth Amendment to the Constitution of the United States.

XIV.

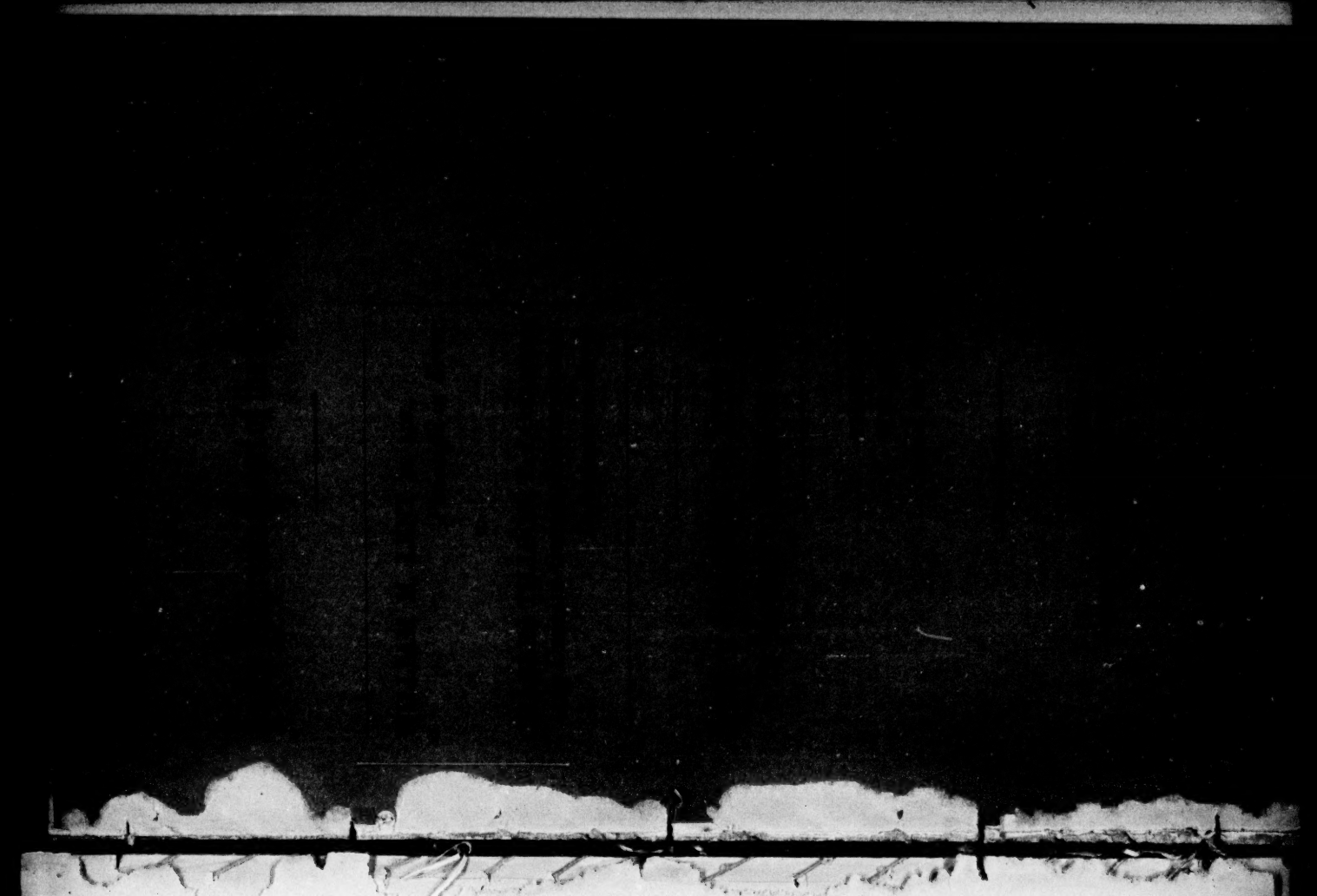
The Supreme Court of California erred in upholding the validity of the authority exercised by said Commissioners, County Court and other officials under the State of California, and in not deciding the said authority, and the exercise thereof was and is repugnant to the Fourteenth Amendment to the Constitution of the United States.

XV.

And by the record aforesaid it appears that the judgment of the Supreme Court of California, aforesaid, given for the defendants in error against the plaintiffs in error; whereas, by the law of the land, the said judgment ought to have affirmed the judgment of the Superior Court, and the said Supreme Court ought to have decided against the validity of the Statute of the State of California, entitled, "An Act to authorize the widening of Dupont Street in the City and County of San Francisco," and against the validity of the authority exercised under said Statute, the validity of which said Statute and authority were herein drawn in question on the ground of their being repugnant to the Constitution of the United States.

And the said plaintiffs in error pray that the judgment and decision of the Supreme Court of California, aforesaid, may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, and that the plaintiffs in error may have such other relief as they may be entitled to.

JOHN GARBER,
Atty. for Plaintiffs in Error.



repugnant to the Fourteenth Amendment to the Constitution of the United States.

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XV.

And by the record aforesaid it appears that the judgment of the Supreme Court of California, aforesaid, given for the defendants in error against the plaintiffs in error; whereas, by the law of the land, the said judgment ought to have affirmed the judgment of the Superior Court, and the said Supreme Court ought to have decided against the validity of the Statute of the State of California, entitled, "An Act to authorize the widening of Dupont Street in the City and County of San Francisco," and against the validity of the authority exercised under said Statute, the validity of which said Statute and authority were herein drawn in question on the ground of their being repugnant to the Constitution of the United States.

And the said plaintiffs in error pray that the judgment and decision of the Supreme Court of California, aforesaid, may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, and that the plaintiffs in error may have such other relief as they may be entitled to.

JOHN GARBER,
Atty. for Plaintiffs in Error.

No......

In the Supreme Court of the United States

WILLIAM M. LENT ET ALS.,
Plaintiffs in Error,

v.

CHARLES TILLSON, TAX COLLECTOR, AND CERTAIN OTHERS, INTERVENORS,
Defendants in Error.

Brief of Plaintiffs in Error in Opposition to Motion to Dismiss and Affirm.

THOS. B. BISHOP AND
WM. M. STEWART,
Counsel for Plaintiffs in Error.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1888.

In the Supreme Court of the United States.

WILLIAM M. LENT ET ALS.,
PLAINTIFFS IN ERROR,

v.

CHARLES TILLSON, TAX COLLECTOR,
AND CERTAIN OTHERS, INTERVENORS,
DEFENDANTS IN ERROR.

The errors claimed by the plaintiffs in error in this cause will be found specifically set forth at pages 369 to 374 of the Record.

They show with particularity the Federal questions that we claim necessarily arise on this record. The suit was for a decree adjudging the original assessment which the tax collector was seeking to enforce illegal, unauthorized, and void (Record, page 16). The complaint will be found on page 1, and the findings of the court on page 113 of the Record. The complaint recited the act of the legislature of California under which the assessment was made and made it a part of the complaint (Record, folio 7). It alleged that the notices required by the act, and which were the only pretence of process that it furnished, had not been given; that the resolution of the Board of Supervisors of San Francisco, which was required by the act as a condition precedent to any action whatever, was never passed; but that nevertheless the Commissioners named in the act,

though without any legal jurisdiction in the premises, had gone on in form and made an assessment.

The particular work to be performed was the widening of a portion of Dupont street in the city of San Francisco, and this was to be done by taking a strip thirty feet wide off of the front of all the lots on the west side of that street.

The complaint alleged, and so the trial court found, that the Board of Commissioners, whose duty it was if the act were valid, to assess damages and benefits in estimating the value of the property taken by the improvement, treated the thirty feet taken off of each lot as if the owner lost his frontage entirely, and wholly ignored the circumstance that the balance of his lot was still left fronting on a better and wider street than before, and on this theory not only estimated the value of the part taken as more than two hundred per cent. of what it in fact was, but entirely ignored the benefit to the balance by reason of the widened street (Record, folios 12 to 17).

The complaint further alleged, and the court found, that the Commissioners, after they had estimated in full all costs and expenses, illegally and arbitrarily added thereto the further sum of seventy thousand nine hundred and thirty-five dollars (folios 17–387).

The only hearing, or opportunity for a hearing, provided for in this act is that awarded in the eighth section (Statutes of California, 1875–6, page 435), a hearing to be had at the option of parties of a certain class after the assessment with respect to its confirmation.

It is admitted on all hands that no hearing *before* or *during* the progress of the assessment is provided for anywhere in the act. The act not only gives none, but the Commissioners themselves prevented any hearing in fact (Record, folio 356).

The eighth section provides, in substance, that any person interested in property within the assessment district, "*feeling himself aggrieved by the action* or determination of the said Board *as shown in said report*," may petition the county court for an order on the Board to file with the court the report of said Board and such other documents or "data as may be pertinent thereto in the custody of said Board and used by it in preparing said report;" that the petition is to be served *on the Board*, "who *may appear by counsel or otherwise*," and "may file a written answer to said petition;" that the court "is *hereby* authorized and empowered to hear said petition;" that "testimony may be taken * * * upon said hearing;" that the court may compel the attendance of witnesses and the production of books and papers; that the court may in its "discretion," *after hearing* "and considering said application, * * * allow said order, or deny the same;" that if granted, a copy of the order shall be served on the Board who shall "proceed to obey the same according to the terms of the order;" that if no such petition is filed, the Board shall, within the time limited for the filing thereof, present its report to the county court with a petition for its confirmation (saying nothing of the "documents" and "data"); that the court "shall have power to confirm said report, or refer the same back * * * with directions to alter or modify the same in the particulars specified;" that the Board shall make the prescribed alterations and again file the report with the court, which, if it finds that the alterations have been made, shall confirm the report, otherwise to again refer it to the Board, "and so on," until the alterations originally directed are made, when the report shall be confirmed.

It will be observed that only those feeling aggrieved by the action of the Board *as shown by the report* could apply

to the courts; their petition was to be served on *the Board alone*, and the *Board* alone could *answer*.

The only order that the court could make in this limited statutory jurisdiction after the hearing was to allow the order that the Board file the report with such other documents or data as may be pertinent thereto.

This was the only hearing that the act allowed.

Certain parties did petition the county court; the petitions were served on the Board; the Board compromised with all the petitioners by reducing the amount of each of their benefits, if they were to be assessed, or increasing the amount of each of their damages, if their property was taken, and this without consulting any of the other property owners or even the court.

With one of the contestants who claimed that the assessment was not made on correct principles, that in fact the owners did not lose their frontage and ought not be paid for a frontage they did not lose, the Board entered into an arrangement that as to his lots the rule should be as he claimed.

Arbitrators were appointed by a stipulation between the attorney of this particular contestant and the attorney of the Board (folios 571 to 574), and a complete estimate was made by them upon the honest, as distinguished from the dishonest, theory. The arbitrators found that the true value of the land taken for the whole improvement was $246,240 instead of $629,913 as found by the Board, and that said Blythe's property would be benefited only in the sum of $39,653 instead of $97,308 as found by the Board, and thereupon the attorney for the Board and the attorney for the petitioner, no one else being consulted, stipulated that Blythe's assessment should be changed accordingly, and the court entered an order so modifying the assessment upon

the stipulation without any investigation or hearing of any kind.

Record, folios 402 to 406.

This exemplifies what kind of a hearing the property owner had under an act which enabled the Board to represent him and answer for him and gave him no other chance.

The hearing upon all objections pending having been continued to the 22d of December, the court nevertheless confirmed the report on the 20th of December, two days before the time appointed (folio 407); there was no hearing of any sort in fact (folios 408 and 409). The total cost of the improvement, as fixed by the report and as confirmed by the county court, was $914,941.00; but the Commissioners immediately proceeded to issue, and did issue, bonds for one million dollars (folio 37). This is alleged in the complaint and not denied in the answer.

One of the Board Commissioners, A. J. Bryant, was one of the property owners and a judge in his own case. This is admitted by the pleadings (folio 33).

The Board of Commissioners, although the act gave them no authority to do it, employed experts to make all their estimates and do all their work for them, and adopted their report absolutely (folio 32); one of the experts, Reynolds, and one of the Board, Bryant, were speculating in the lands affected (folios 33, 34, 35, 36).

The total amounts of *benefits* to all the property, as finally fixed by the report as confirmed, was only $796,837, while the cost, as thereby fixed, was $914,941, so that the cost, as fixed by the report, exceeded the benefit by over one hundred thousand dollars, and the bonds exceeded the benefits over $200,000.

After the commencement of the action a considerable

number of bondholders intervened, and put fully in issue with the plaintiffs the validity of the assessment, all the proceedings and of their bonds (Record, page 25); no objection was made to this intervention, and the property owners, the plaintiffs in error here, took issue with it by answer (Record, page 841).

By the rule of law in force in California this voluntary submission to the jurisdiction of the court having taken place, and a decision upon the merits having followed, neither party could afterwards claim that the intervention was improper, or that the issue thus determined had not properly been raised.

Donner *v.* Palmer, 51 Cal., 629.
McKenty *v.* Gladwin, 10 *Id.*, 228.
Smith *v.* Penny, 44 *Id.*, 164.

The issue presented by that intervention having been voluntarily tendered, accepted, tried, and determined, the judgment had the same effect as if it were the result of an independent litigation between the same parties; neither party could afterwards withdraw from the intervention.

For obvious reasons the intervenors could not thereafter be heard to make any objection to the nature of the plaintiffs' action.

If the decision had been in their favor it would have been too late for the property owners to object that the intervention was not proper.

As said by the supreme court of California, in Donner *v.* Palmer, our judicial system has not yet provided for the establishment of moot courts, or made it our duty to solve legal conundrums for purposes of mere amusement or instruction.

The judgment of the trial court against the intervenors was one which could not be disposed of by the appellate

court upon the ground that the plaintiffs in the action had mistaken their remedy.

The supreme court of the State was obliged to decide the merits in order to reverse the judgment, and those merits included and depended upon the solution of the Federal questions, as to which we invoke the jurisdiction of this court. As a matter of fact the supreme court of California recognized this, and did, by the concurrence of four judges out of seven, actually decide the case upon the merits and on Federal grounds (see opinion, page 332; certificate, page 367).

Thus establishing, so far as the State courts were concerned, the law of the case against the plaintiffs in error; one judge, McKinstry, concurred in the judgment upon the ground of the remedy, and one judge, Patterson, dissented.

Much stress is laid upon the circumstance, that the complaint does not allege, in terms, the unconstitutionality of the statute; but the code practice prevails in California, and under that system allegations of mere legal conclusions are not tolerated.

The rule is thus stated by Pomeroy: "The issuable facts in a legal action, and the facts material to the relief in an equitable suit, should not only be stated to the *complete exclusion* of the *law* and the *evidence*, but they should be alleged as they actually existed or occurred, not their legal effect, force, or operation. Every attempt to combine fact and law, to give the facts a legal coloring and aspect, to present them in their legal bearing upon the issues rather than in their actual naked simplicity, is so far forth an averment of law instead of fact, and is a direct violation of the principle upon which the codes have constructed their system of pleading."

§ 529, Pomeroy on Remedies.

Vide also *Id.*, §§ 524–530.

Said Field, C.-J., in Green *v.* Palmer (15 Cal., 414): "Facts only must be stated. This means * * * the facts as contradistinguished from the law, from argument, from hypothesis and from the evidence of the facts. *A legal inference or conclusion* from the facts should not be stated. That is not the province of the pleadings under our system, which is to develop the facts. To apply the law to the facts, that is, to draw thence legal inferences or conclusions, is the province of the court."

The trial court adjudged the assessment wholly void.

In response to our claim, that the hearing allowed by the act was clearly insufficient, the learned judge of the supreme court, who delivered its opinion therein, said (folio 1045): "*I think this, perhaps, the most debatable point in the case, but the difficulty arises to a great extent from the disposition to compare the opportunity here afforded with that deemed essential in ordinary judicial proceedings. Measured by that standard it would unquestionably be deemed insufficient;*" and then Cooley is cited to show that in tax cases, and the like, that may constitute due process of law which would not suffice in ordinary judicial proceedings.

Why, if measured by the standard of ordinary judicial proceedings, was the opportunity afforded unquestionably insufficient? Is it not solely because of the conclusive nature and effect of ordinary judgments? Has Cooley ever intimated that under the taxing power, or any other, rights can be concluded by a sentence possessing all the attributes of judicial estoppel and finality, without an opportunity for hearing unquestionably sufficient in ordinary judicial proceedings? Granted that in tax cases a jury trial is not essential. So neither is it in chancery cases. Still, in tax cases, an opportunity to be heard is essential, and a judicial hearing, with all its ordinary attributes, at some stage is a prerequisite to the absolute di-

vestiture of rights and the cutting off of defences. Can Cooley be cited as authority for the position that under the taxing power the assessment, though made under notice and opportunity for hearing unquestionably insufficient in ordinary judicial proceedings, can be given all the conclusive effect of an ordinary common-law judgment? Are not all his writings and opinions clear the other way? (20 Am. Law Reg., N. S. 14, cited page 75.)

The result here is that when we object that the statute was not followed—that frauds were perpetrated, &c.—we are told that the judgment of the county court is a bar, that its decision is to have all the effect of judgments in ordinary judicial proceedings. And when we object that, treated by all the other rules applicable to ordinary judicial proceedings, the judgment of the county court is unquestionably a nullity, we are told that to this judgment such rules are inapplicable.

Can the position that an assessment not made in pursuance of the statute claimed to authorize it—not only that, but rotten with fraud, is shielded from attack by a judgment or decision rendered by a tribunal *in which* the opportunities for hearing were *unquestionably insufficient*, measured by the standard essential to judicial proceedings —be supported by either reason, authority, or justice?

Is it not true that every adjudication that tax proceedings may be summary and unjudicial goes hand in hand with the other precedents, that the statutory power must be strictly construed and closely followed, and that the assessment may be attacked for fraud, and that all attempts to make them conclusive against such attacks are unconstitutional?

Our question here is not simply the question, admittedly Federal, raised in the New York case, where the legislature attempts in legal effect to assess without any notice or

hearing. It is that question and more. Here the statute provided for a semblance only of both, and in a way that was clearly insufficient. Here the notice *provided* for was not given. Here the hearing *provided* for was not allowed. Here, because of fraud, collusion, and imposition, the judgment was no judgment.

The case presented is more extreme upon the face of this record than that which was presented to this court in Windsor against McVeigh (93 U. S., 274).

Our claim is that it appears by the record, not only that a Federal question was necessarily involved in the decision and judgment given and rendered by the supreme court of the State, but that such question was actually raised and decided adversely to the Federal right asserted and set up by them in this action, and that said decision and judgment could not have been given and rendered without so deciding that question. The Federal question claimed to have been so involved, raised, and decided is this: That by the assessment, the collection of which is sought to be enjoined in this action, the plaintiffs in error will, if the decision and judgment of the supreme court of the State should be sustained, be deprived of their property without the "due process of law" and the "equal protection of the laws" guaranteed to them by the fourteenth amendment to the Constitution of the United States, for the following reasons: 1. That the statute under which said assessment purports to have been levied is unconstitutional and void, in that it did not award to the property owners assessed due notice and an opportunity to be heard against the validity of the assessment before it became fixed. 2. That the said statute is also unconstitutional and void in that it seeks to deprive the property owners assessed of their property, without "due process of law," by authorizing an assessment by the State by officers of its own selection,

within a municipality, contrary to a provision of the constitution of the State then in force. 3. That if the statute is valid the plaintiffs in error were nevertheless deprived of the "due process of law" and the "equal protection of the laws" guaranteed to them by the fourteenth amendmendment to the constitution of the United States, because the resolution of the Board of Supervisors required by that statute to authorize the improvement, to pay for which said assessment was made, and the levy of said assessment, was never in fact duly passed, because the notice and hearing provided for in said statute were never in fact allowed, and because, by the frauds and misconduct of the Board of Commissioners making said assessment, appearing on the face of their proceedings, they exceeded their jurisdiction and made said assessment wholly without warrant or authority of law.

We deny that the doctrine of this court is, as asserted by the learned counsel for the defendants in error, that in order to give the court jurisdiction in this class of cases it must always appear by the record that the Federal question relied on was necessarily involved, in the sense that the decision of it was "necessary to the determination of the cause." The true rule is, as it has been announced in many decisions from the earliest history of the court until now, that in order to sustain the jurisdiction under the 25th section of the Judiciary Act of 1789, or the section of the act of 1867 incorporated into the Revised Statutes as section 709, it must appear by the record certified to this court that a Federal question was necessarily involved in the decision as rendered, or that it was actually raised and decided adversely to the Federal right claimed by the plaintiffs in error. If it was actually raised and so decided it is immaterial whether it was necessary to raise and decide it or not. Indeed if it was actually raised and decided

it is but a truism to say that it was "necessarily involved" in the decision *as rendered*. This point, however, will be discussed later. For the present we will assume, for the sake of the argument merely, that the rule is as stated by the learned counsel for the defendants in error, and that the sole test of the jurisdiction is that it must appear that the Federal question was "necessarily involved." Upon this assumption we maintain that the jurisdiction of this court in this case is clear and indubitable.

I.

General Doctrine respecting the Jurisdiction here invoked stated.

Before entering upon a particular discussion of the several points raised by the motion to dismiss in this case, we desire to state in general terms what we conceive to be the fundamental doctrine underlying the jurisdiction which we here invoke. There are certain broad general principles lying at the very foundation of the jurisdiction. The discussions are but illustrations of their application.

By the Constitution of the United States certain rights are guaranteed. By no device, technicality, or shift can they be infringed. Under our system the States have, subject to the Constitution of the United States, all the functions of sovereignty. They have executive, legislative, and judicial departments by which those functions are exercised. But, in the last resort, all such action, whether executive, legislative, judicial, or ministerial, is subject to review by the Federal judiciary. In no conceivable way can such action be so shaped as to deprive the citizen of his right to a decision by the Federal judiciary of the question whether by that action he has been

deprived of a right secured by the Constitution of the United States.

On principle, then, it would seem to be of no moment whether the supreme court of California *might* have decided this case without considering the question whether the enforcement of the assessment will deprive the plaintiffs in error of their property without due process of law. That tribunal being the court of last resort, so far as State action is concerned, has seen fit on the record before them to decide the Federal question, and the majority of that court, in obedience to the mandate of the State constitution, has placed upon record "the grounds of the decision." These grounds have been given in writing, and, in terms, they conclude the Federal question. It matters not that the minority did not concur in those grounds, or that the minority might have reached the same conclusion on different grounds. The grounds of the decision as stated by the four concurring justices, Temple, McFarland, Searles, and Thornton, in the absence of the power of revision by the Federal judiciary, have become irrevocably the law of this case. We have also the certificate of the State supreme court that they did decide the Federal question. It is equally clear that, at least in California, the judgment we seek to reverse will, if allowed to stand, be conclusive as *res adjudicata* in a subsequent or other action in which the same Federal question may be presented (420 *Mining Co.* v. *Bullion*, 3 Sawyer, 651).

It inevitably results that, whatever might have been the case if the State supreme court had reversed the judgment on the ground suggested by Mr. Justice McKinstry, as the record now stands, taking it all together, the pleadings, the findings, the opinion of the majority stating the grounds of decision, the certificate, &c., it has been determined, so far as State action can determine it, forever, that our prop-

erty may be legally subjected to the lien of this assessment, and that we have had due process of law. Especially is this the practical result in view of the doctrine of *Gelpcke* v. *Dubuque* (1 Wall., 175), which is peculiarly applicable to cases of this kind. Again, this is not a case where the State court has decided both a Federal and a non-Federal question, upon either of which the decision may be sustained. The most that can be said is that though the court, as it certified, decided the Federal question on the merits, it *might* have reached the same result by adopting Mr. Justice McKinstry's view as to the remedy, and so have disposed of the case on a mere question of practice.

But it could not. There is no decision here or elsewhere justifying it. Where, as here, the assessment is to be collected in installments for many years, all the decisions sustain the jurisdiction on the ground of avoiding multiplicity of suits.

To sustain the present contention on behalf of the defendants in error is to further carry out the juggle which has so far succeeded, with the practical result of taking our property without ever giving us a judicial hearing.

Judge Temple, in delivering the opinion of the court, admitted and decided that we had not the opportunity usual in judicial hearings. He refused us one himself. Somewhere we must have it; otherwise the solemn guaranty of "due process of law," and of the "equal protection of the laws," contained in the fourteenth amendment to the Constitution of the United States, is a mere sham, keeping the word of promise to the ear but breaking it to the hope. But if this court should, in compliance with the motion which we are now considering, dismiss this writ, it would be an absolute denial forever of that opportunity to be heard which that amendment purports to secure to us.

With this preliminary statement of the general princi-

ples underlying the jurisdiction to which we here appeal, we proceed to a more particular discussion of the points involved in the present motion.

II.

FEDERAL QUESTION NEED NOT BE FORMALLY RAISED OR PRESENTED BY THE PLEADINGS OR OTHERWISE, BUT IT IS SUFFICIENT IF BY FAIR INTENDMENT IT APPEARS FROM THE RECORD TO HAVE BEEN NECESSARILY INVOLVED IN THE DECISION AS RENDERED.

It has been ruled over and over again in this court that the Federal question necessary to confer jurisdiction under the 25th section of the judiciary act of 1789, and the later statutes enacted in its stead, need not be expressly raised or set out in the record, but that it is sufficient if it appears by fair intendment to have been involved in the decision made. Mr. Justice Story thus states the rule on this subject in *Crowell* v. *Randell* (10 Pet., 368, 392) upon an elaborate review of the cases: "The doctrine of the court has been that it is not indispensable that it should appear on the record *in totidem verbis* or by direct and positive statement that the question (*i. e.*, the Federal question) was made and the decision given by the court below on the very point; but that it is sufficient if it is clear, from the facts stated, by just and necessary inference, that the question was made and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment." To the same effect are: *Smith* v. *Maryland*, 6 Cranch, 280; *Martin* v. *Hunter's Lessee*, 1 Wheat., 305, 355; *Miller* v. *Nicholls*, 4 *Id.*, 311, 315; *Williams* v. *Norris*, 12 *Id.*, 117, 124;

Willson v. *Blackbird Creek Co.*, 2 Pet., 245, 250; *Satterlee* v. *Matthewson*, *Id.*, 380; *Harris* v. *Dennie*, 3 *Id.*, 292; *Bridge Proprs.* v. *Hoboken Co.*, 1 Wall., 142; *Furman* v. *Nichol*, 8 *Id.*, 44, 56, 57; *Murray* v. *Charleston*, 96 U. S., 441; *Chicago, &c.*, v. *Needles*, 113 *Id.*, 574; *Eureka, &c., Co.* v. *Yuba Co.*, 116 *Id.*, 410; *Palmer* v. *Hussey*, 119 *Id.*, 96.

It is not necessary, therefore, that the provisions of the Constitution of the United States, or the Federal statute or treaty, which is relied on, should be set out or specifically referred to. *Bridge Prop'rs.* v. *Hoboken Co.* (1 Wall., 142); *Furman* v. *Nichol*, (8 *Id.*, 56). In the former of these two cases Mr. Justice Miller says: "It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case.' * * * The true and rational rule is that the court must be able to see clearly from the whole record that a certain provision or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

Nor need it be alleged where, for instance, the plaintiff relies on that provision of the Constitution of the United States forbidding the enactment of State laws impairing the obligation of contracts, that any particular

statute does impair his contract (*Furman* v. *Nichol*, 8 Wall., 57). That case arose upon a petition for a *mandamus* to compel the defendant, a county clerk, to receive in payment of a certain license required of the plaintiff by statute, bills of the Bank of Tennessee pursuant to a stipulation in the charter of the bank that its bills should be received in payment of taxes and other moneys due the State. The petition alleged that the stipulation in question was a contract between the State and the holders of said bills, which the State could not impair. It referred to a subsequent statute whereby the receiving of bills of said bank in payment of taxes was forbidden, but there was no averment that this statute impaired the obligation of any contract. On this point Davis, J., said: "It is insisted that the petition should have averred that the State had impaired, or by some act attempted to impair, the obligation of a contract; but this does not sufficiently appear by necessary intendment, for it is alleged that Furman was the owner of the notes, and entitled to have them received for taxes, by virtue of a contract with the State; that he had tendered them to the defendant, who refused to receive them, and that it was not in the power of the legislature to impair the validity of this contract." And his honor further held that the State court, in dismissing the petition for mandamus, "necessarily adjudged that there was not at the time such a contract as the plaintiff Furman claimed authorized him to make the tender to the clerk of the notes of the Bank of Tennessee. The jurisdiction of this court is, therefore, complete, and the case must be decided on its merits."

Even though the Federal question is somewhat "obscurely" raised, it is sufficient to sustain the jurisdiction (*Pennywit* v. *Eaton*, 15 Wall., 381). The form or mode of raising the question is immaterial if it was raised and de-

cided adversely to the Federal right. Thus in *Palmer* v. *Hussey* (119 U. S., 96) it was held that a Federal question was raised so as to give the Supreme Court of the United States jurisdiction to review the judgment of the highest court of a State by a motion for a perpetual injunction against a judgment of a State court on the ground of the debtor's subsequent discharge in bankruptcy.

In *Davis* v. *Packard* (6 Pet., 41) a Federal question was held to be sufficiently raised where the plaintiff in error, after a judgment against him in the supreme court of the state in a case in which, so far as appeared from the record, no Federal question was involved, brought a writ of error to the court of errors assigning as error in fact that he was exempt from suit in a State court by reason of his being the Swedish consul-general. The defendant in error replied that there was no error, because it did not appear by the record that the plaintiff in error was consul, as claimed. The court of errors affirmed the judgment, stating in its record that it had "diligently examined and fully understood the causes assigned for error." The plaintiff in error then brought error to the Supreme Court of the United States. A motion was made to dismiss, and affidavits were filed on both sides as to what took place in the court of errors. The court refused to look into the affidavits, but overruled the motion, because it sufficiently appeared from the record of the writ of error that a Federal question was involved and decided adversely to the Federal right set up.

Thompson, J., delivering the opinion, among other things, said: "It has also been settled, that in order to give jurisdiction to this court, under the 25th section of the judiciary act (2 vol. L. U. S., 65). it is not necessary that the record should state, in terms, that an act of Congress was in point of fact drawn in question. It is sufficient if it ap-

pears from the record that an act of Congress was applicable to the case, and was misconstrued, or the decisions in the State court were against the privilege, or exemption, specially set up under such statute (4 Wheat., 311; 2 Pet., 250; 3 *Id.*, 301; 4 *Id.*, 429.) How stands the record, then, in this case? Charles A. Davis alleges that he is consul-general of the king of Saxony in the United States, and that he is thereby privileged from being sued in the State court according to the Constitution and laws of the United States. The fact of his being such consul is not denied by the joinder in error. The answer given is that it nowhere appears by the record, proceedings, or judgment of the supreme court that the said Davis was such consul; and the court of errors, in giving judgment, say, after having examined and fully understood the causes assigned for error, they affirm the judgment of the supreme court. This was deciding against the privilege set up under the act of Congress which declares that the district court of the United States shall have jurisdiction, exclusively of the courts of the several States, of all suits against consuls and vice-consuls 2 vol. L. U. S., 60, sec. 9.

"The question before this court is not whether the judgment of the supreme court in New York was correct. It is the judgment of the court for the correction of errors that is to be received here. That is the final judgment in the highest court of the State, and none other can be brought into this court under the 25th section of the judiciary act."

His honor then proceeds to show that the question whether it was competent for Davis to assign in the court of errors, as error in fact, his exemption from suit in a State court, was not presented by the record, and probably could not have been made, and says: "From the record, then, we are necessarily left to conclude that the State court, as-

suming or admitting the fact that Davis was consul-general, as alleged in his assignment of errors, yet it did not exempt him from being sued in a State court; which brings the case within the 25th section of the judiciary act, the decision having been against the exemption set up and claimed under a statute of the United States."

III.

PLEADINGS IN THIS CASE, APART FROM THE REST OF THE RECORD, SHOW THAT THE QUESTION OF THE REPUGNANCY OF THE DUPONT STREET-WIDENING ACT TO THE CONSTITUTION OF THE UNITED STATES WAS NECESSARILY INVOLVED.

The complaint, answer, complaint in intervention, and answer thereto, in this case, show that the sole warrant and authority for the assessment, whose collection is sought in this action to be enjoined, are to be found in the act there referred to providing for the widening of Dupont street. Without that statute, and unless that statute is valid, the assessment is unquestionably void, and if permitted to be enforced will result in the taking of the property of the plaintiffs in error without "due process of law," and will deprive them of "the equal protection of the laws" guaranteed to them by the Constitution of the United States. How, then, is it possible to escape the conclusion that the decision of the supreme court of the State affirming the validity of that statute and of the assessment made under it, and directing that the injunction against the collection of said assessment be dissolved and that the plaintiffs' complaint be dismissed, "necessarily involved" the determination of the Federal question of the repugnance or non-repugnance of that statute to the Constitution of the United States, even

though it be admitted that that question is nowhere in the pleadings stated in express terms, and that the complaint contains no destruction of any right, privilege, or immunity under the Federal Constitution? Undoubtedly the court might have decided *against* the validity of the assessment, and have affirmed the judgment of the superior court, without passing upon the validity of the statute at all. But that was not the decision that was rendered, and it is to the judgment or decision as rendered, and not to any possible judgment or decision that *might* have been rendered, that we must look to ascertain whether a Federal question was "necessarily involved" so as to give this court jurisdiction, assuming the claim of the learned counsel for the defendants in error that the Federal question must be "necessarily involved" to confer the jurisdiction to be a correct statement of the law. And the question of the constitutional validity or invalidity of the statute is inextricably and "necessarily involved" in, and bound up with, the judgment and decision as *rendered.*

A leading case, establishing the doctrine that when the sole warrant or authority for a claim set up by either of the parties to a suit is a statute, which is the position of the defendants in error here, a decision in favor of that claim necessarily involves an express or implied adjudication in favor of the constitutional validity of that statute, is *Willson* v. *Black Bird Creek Co.* (2 Pet., 245, 250). That was an action of trespass brought against the plaintiffs in error, who were defendants below, for breaking and injuring the dam of the defendant in error, who was plaintiff below, erected across Black Bird creek, pursuant to an authority conferred by an act of legislature. There were pleas filed, only one of which, however, seems to have been considered by the court in its decision. That plea was, in substance, that the creek was a "public and common navi-

gable highway;" that the defendants, at the time of the alleged trespass, were lawfully navigating the same; that the dam was wrongfully erected; that the defendants could not pass without cutting it, and that they did not cut and remove it, doing no unnecessary damage.

A general demurrer was interposed to all the pleas, which was sustained by the supreme court, and that judgment was affirmed by the court of appeals, whereupon the defendants brought error to the Supreme Court of the United States. That court refused to dismiss the writ, holding that the constitutional validity of the statute under which the plaintiff claimed was necessarily involved in the decision rendered, and that this was a Federal question giving jurisdiction under the 25th section of the judiciary act of 1789, the decision having been in effect in favor of the validity of the statute. Mr. Chief-Justice Marshall, delivering the opinion, said:

"The defendants in error deny the jurisdiction of this court because, they say, the record does not show that the constitutionality of the act of the legislature under which the plaintiff claimed to support his action was drawn into question. Undoubtedly the plea might have stated in terms that the act, so far as it authorized a dam across the creek, was repugnant to the Constitution of the United States; and it might have been safer, it might have avoided any question of jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the act was the question, and the only question which could have been discussed in the State court. That question must have been discussed and decided. The plaintiffs sustain their right to build a dam across the creek by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly.

"*The plea does not controvert the existence of the act*, but denies its capacity to authorize the construction of a dam across a navigable stream in which the tide ebbs and flows, in which there was, and of right ought to have been, a certain common and public way in the nature of a highway. This plea draws nothing into question but the validity of the act, and the judgment of the court must have been in favor of its validity. Its consistency with, or repugnancy to, the Constitution of the United States, necessarily arises upon these pleadings and must have been determined. This court has repeatedly decided in favor of its jurisdiction in such a case. *Martin* v. *Hunter's Lessee*, (1 Wheat, 355); *Miller* v. *Nichols* (4 *Id.*, 311), and *Williams* v. *Norris* (12 *Id.*, 117) are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms on the record that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the 25th section of the Judicial Act if the record shows that the Constitution, or a law, or a treaty, of the United States must have been misconstrued or the decision could not be made. Or, as in this case, that the constitutionality of a State law was questioned, and the decision has been in favor of the party claiming under such law."

It is perfectly clear that if that decision is correct, as it unquestionably is, it abundantly sustains the jurisdiction of this court in this case. The Federal question no more clearly appears in that case than in this. Indeed it does not appear so clearly, for in this case there is a distinct and express claim in the complaint that the plaintiffs in error have not in fact been awarded "due process of law," having been deprived even of such notice and opportunity for hearing, &c., as the statute in question purports to allow. The plea in that case did not, as Chief-Justice Marshall says, "controvert the existence of the act" relied on, nor directly put its con-

stitutionality in issue. Saying nothing of the validity of the statute, it simply averred that the plaintiff's dam was wrongfully erected. In the present case there is also no direct averment that the statute, under which the assessment now sought to be enjoined purports to have been made, is repugnant to the Constitution of the United States, but the complaint does distinctly and emphatically allege, in substance, that the Commissioners who made the assessment "were never authorized to act under the provisions of said statute; that the assessment was and is wrongful, illegal, and made without jurisdiction or lawful authority, and the prayer is that the said pretended tax be adjudged and declared illegal, unauthorized and void" (Record, fols. 7–46), and so the trial court decided (Record, fol. 444).

The fundamental principle underlying the decision in *Wilson* v. *Black Bird Creek Co.* obviously is, that although there was no direct averment of the constitutionality or unconstitutionality of the statute there in question, and although it was simply referred to in the declaration as containing the warrant and authority for the erection of the plaintiff's dam, and for the consequent claim of damages, a decision in favor of its validity was necessarily involved in any judgment sustaining the plaintiff's claim. The same principle applies here to the act under which the assessment now in question purports to have been made. It furnishes the sole authority for the assessment, and for the claims of the defendants and intervenors, and its validity is necessarily involved and drawn in question in the judgment sustaining the assessment and the defendants' and intervenors' contentions and dissolving the plaintiffs' injunction.

The plaintiffs' reference make the act a part of their complaint as fully as if incorporated in it (Record, fol. 7).

The intervenors aver that their bonds "were issued under," and as they are informed and believe, "in accordance with, the provisions" of said act (*Id.*, fol. 74); and they constantly refer to it throughout their complaint in intervention as the sole authority for the proceedings of the Board of Commissioners. The validity of the statute, and of the authority conferred by it, is also repeatedly averred by allegations to the effect that the proceedings of the Board "were lawfully authorized * * * by the provisions of said act," and the like (*Id.*, fol. 95, *et passim*). The same may be said of the answer of the defendants.

Another case in point, arising under the judiciary act of 1789, is *Craig* v. *Missouri* (4 Pet., 410, 428). That was a case of assumpsit on a certain promissory note alleged to have been made by the defendants to the State of Missouri. The defendants pleaded the general issue. The case was tried without the intervention of a jury, and judgment rendered in favor of the plaintiffs, which was affirmed by the supreme court of the State, and the defendants then brought error to the Supreme Court of the United States. The record of the court in which the cause was originally tried contained this entry: "On the second day of said court, in open court, the parties came into court, by their attorneys, and neither party requiring a jury the cause is submitted to the court; therefore all and singular the matter and things and evidences being seen and heard by the court, it is found by them that the said defendants did assume upon themselves in manner and form as the plaintiffs, by their counsel, allege; and the court also find that the consideration for which the writing declared upon, and the assumpsit was made, was for the loan of loan office certificates, loaned by the State at her loan office at Chariton, which certificates were issued, and the loan made in the manner pointed out by an act of the legislature of the said State

of Missouri, approved the 27th day of June, 1821, entitled an act for the establishment of loan offices," &c.

The defendants in error sought to have the writ of error dismissed for want of jurisdiction, because there was nothing in the record to show that any Federal question was involved. The court, however, Chief-Justice Marshall delivering the opinion, held the case to be within the jurisdiction conferred by the 25th section of the judiciary act of 1789, because the decision rendered necessarily involved the validity of a State statute, as not being repugnant to the prohibition in the Federal Constitution against the emission of bills of credit by the States, although the pleadings contained no apparent reference to any such statute, and certainly the plea did not expressly controvert its validity, and although it was not stated in terms, in the record, that the State court held the statute to be constitutional.

The learned chief-justice held that, under the plea of *non assumpsit*, the defendants could controvert the validity of the statute mentioned, and that "the motives stated by the court on the record (in the entry above referred to) for its judgment, and which form a part of the judgment itself," showed that the validity of the statute was drawn in question, and that the decision rendered necessarily involved a decision of that question. His honor further said:

"If, in such a case, the mere omission of the court of Missouri to say, in terms, that the act of the legislature was constitutional, withdraws that point from the cause, or must close the eyes of the appellate tribunal upon it, nothing can be more obvious than that the provisions of the Constitution, and of an act of Congress, may be always evaded, and may be often, as we think they would be in this case, unintentionally defeated."

Another case, which is an equally cogent authority against

the dismissal of the writ in this case, is *Murray* v. *Charleston* (96 U. S., 441). That case arose, not under the judiciary act of 1789, but under the act of 1867. It was an action brought by the holder of certain city stock against the city of Charleston to recover a part of the interest on said stock which had been withheld by the treasurer as a tax thereon, the complaint alleging that the tax was illegal. The city by its answer set forth that the stock was duly assessed and was not specially exempted from taxation by the ordinances under which it was issued. The case was decided by the court, without the intervention of a jury, in favor of the city, the court finding the fact, and that as matter of law, the tax was rightfully imposed. The court held that the case necessarily involved a decision that the ordinances imposing the tax were not void under the Constitution of the United States as impairing the obligation of a contract.

Strong, J., delivering the opinion, said : " The form and mode in which the Federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided. The act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a State in suits where is drawn in question the validity of a statute of, or authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the ' decision is in favor of their validity.' Not a word is said in respect to the mode in which it shall be made to appear that such a question was presented for decision. In the present case it was necessarily involved without any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly. In questions relating to our jurisdiction, *undue importance is often attributed to the inquiry whether the pleadings in the State court expressly assert a*

right under a Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised." See also *Chicago, &c., Co.* v. *Needles* (113 U. S., 574), and other decisions heretofore cited to the point that, in order to sustain the jurisdiction of the Supreme Court of the United States in cases of this sort, it need not appear from any part of the record that the Federal question was raised in the State court formally or in terms.

IV.

Complaint does not Admit the Constitutionality of the Dupont Street Act, as Claimed by the Learned Counsel for the Defendants in Error.

The learned counsel for the defendants in error claims that the complaint in this case admits the constitutionality of the act under which the assessment complained of was made because it was alleged that the "proceedings all appear to be regular and valid on their face, and make a *prima facie* lien on all the said estate," &c., and that the "said proceedings constitute an apparent lien upon all the said real estate of the plaintiffs, and work a cloud upon the respective titles of the plaintiffs to their respective lots,

and do an irreparable injury thereto;" and also that "the sales of the tax collector, if made, will constitute clouds upon the title of the plaintiffs." The learned counsel says that these averments cannot be true if the statute is unconstitutional and void, because an assessment under such a statute could not cast a "cloud" on a title. He says, therefore, that if the plaintiffs had averred the unconstitutionality of the statute they would, necessarily, have admitted that the proceedings did not constitute a cloud upon their title, and that the ground upon which they invoked the aid of equity would have failed.

We deny that the averments referred to amount to an implied admission of the constitutionality of the statute, even conceding the claim of the learned counsel that an assessment or sale under an unconstitutional statute could not create a cloud on title so as to warrant the interposition of equity. Those averments simply allege what the pleader supposes is, or will be, the legal effect of certain proceedings.

Granting it to be true that an assessment or sale under an unconstitutional statute would not cast a "cloud" upon title, the pleader here may have supposed that it would. If he has made a mistake in his law in averring what would be the effect of proceedings under an unconstitutional statute, is he to be held, contrary to the fact, to have averred that the statute was constitutional? Such a result would not merely be unjust—it would be absurd. Throughout this long litigation it has never been held, or ever claimed before, that the plaintiffs, by the averments mentioned, have precluded themselves from contesting the constitutional validity of this statute.

The learned counsel for the defendants in error is himself in error in his statement that, if the statute in question is unconstitutional, an assessment or sale under it

would not cast a "cloud" upon the title to the property sold, and, therefore, that the ground on which the aid of equity is here invoked fails. As will be shown hereafter, there are multitudes of cases holding that a sale under an unconstitutional statute may be enjoined, and, in some of these cases, the fact that the statute under which the sale is to be made is unconstitutional, is made a ground of *granting*, rather than *refusing*, an injunction (*City National Bank* v. *Paducah*, 2 Flipp., 61). The aid of equity is not invoked here solely on the ground of preventing a "cloud" upon title, but also, as affirmatively appears in the complaint, on the grounds of preventing a multiplicity of suits, and irreparable injury, as well as of fraud. And, furthermore, the complaint shows the "cloud" on title which the pleader had in view was not the mere legal technical "cloud" spoken of in some of the cases, but a "cloud" of such a nature as would *in fact* impair the market value and salability of the property. The complaint says: "That said defendant, as tax collector aforesaid, claims, and has publicly announced, that said property, if sold by him under said assessment, will not be subject to redemption; and these plaintiffs aver that if said tax collector is permitted to proceed and sell, purchasers are standing ready to buy, and will buy all said property at such sale; and such sales, when made, will constitute clouds upon the title of these plaintiffs to their said lands, *of such a character that none of them will be able to sell their lands without removing such cloud, and that no searcher or examiner of titles, or lawyer, would approve the title to said lands after the same had been covered by such a sale thereof, and no person could be found who would buy said lands without the removal of such cloud.*"

Liens, fols. 43, 44.

The pleader who framed this averment undoubtedly had in view that class of cases in which it has been held that a sale, assessment, or other proceeding, absolutely void on its face, cannot constitute a technical "cloud" on title. He evidently intended to aver that the sales threatened in this case, whether they would create a technical "cloud" or not, within the meaning of those decisions, would nevertheless create a "cloud" upon the plaintiffs' title "*of such a character*" as in fact to interfere with the sale, and impair the market value of their lands. Can it be doubted that a cloud "*of such a character*" as that described would in fact result from the sales here threatened, even though the statute is unconstitutional? Would any competent lawyer, would the learned counsel for the defendants in error himself, approve a title thus obscured, however thoroughly convinced he might be of the unconstitutionality of the statute? It needs no legal knowledge, it requires only ordinary business experience and sagacity, to be able to understand that a defect of that description, even though it results from proceedings absolutely void on their face, does actually impair the salability of property. In principle, then, there is no conceivable reason why equity should not lend its aid to prevent the creation of such a "cloud." It would be merely to mock at the calamity of the property owner in such a case for a court of equity to tell him that he is perfectly safe and requires no equitable relief because a void sale can cast no "cloud" on his title, when he knows, and the judge of the court knows, that if the sale is permitted, his land will thereby become practically unsalable.

But whether an assessment or sale, under an unconstitutional statute, would cast a "cloud," either technical or actual, upon the title to land or not, it is certain that an averment that an assessment or sale in a particular case

will create such a cloud, cannot be construed into an averment or admission of the constitutionality of the statute.

V.

COMPLAINT SHOWS ALSO DRAWN IN QUESTION THE VALIDITY OF AN AUTHORITY EXERCISED UNDER THE STATUTE MENTIONED ON THE GROUND OF ITS REPUGNANCY TO THE CONSTITUTION OF THE UNITED STATES, INDEPENDENTLY OF THE QUESTION OF THE VALIDITY OF THE STATUTE.

Upon this point there seems no room for even a shadow of doubt. Assuming the validity of the statute, the complaint avers, in substance and effect, that in the exercise by the State, through its agents and representatives, the Commissioners, of the authority derived from said statute, the plaintiffs were deprived of the "due process of law," and "the equal protection of the laws" guaranteed to them by the fourteenth amendment to the Constitution of the United States. The right to a compliance with the provisions of the statute respecting the conditions precedent to an exercise of the authority, and the notice and hearing to be allowed to parties assessed, is distinctly set up, and the non-compliance of the Commissioners with those provisions, and their misconduct in other particulars, whereby they exceeded their jurisdiction and rendered the whole proceeding *coram non judice* and void, are expressly, specifically, and positively averred.

1. *The resolution of the Board of Supervisors.*

In the first place there is a distinct allegation that the resolution of the Board of Supervisors of the city, required by the statute before any other procedings could be had, was never passed. The learned counsel for the defendants in error says that the passage of this resolution was

not made by the Federal or State constitution a "condition precedent" to the exercise of the authority. But the statute made it so. That statute is set out *in extenso* in the petition for writ of error. (Transcript, pp. 553, *et. seq*). By section 21 of the statute it was expressly provided that, if the resolution in question should not be passed, "no further proceedings" should be had or taken under the statute, and the street should remain of its former width. This clearly renders the passage of such resolution indispensable.

Zeigler *v.* Hopkins, 117 U. S., 683.

Assuming it to be true, as the learned counsel for the defendants in error claims (although we emphatically deny that it is true), that the legislature could have ordered this improvement "without consulting any except its own sovereign will," it is sufficient to say that it did not choose to do so. It required the passage of the resolution as an absolute "condition precedent" before any further step could be taken. The State, nevertheless, through the Board of Commissioners created by it and constituted its representative, went on and made the improvement and assessment, according to the allegations of the complaint, without the passage of any such resolution. It is not absolutely clear that this was a denial by the State of "the due process of law," and of "the equal protection of the laws," guaranteed by the fourteenth amendment to the Constitution of the United States. It is claimed, however, that it appears elsewhere in the record that the resolution was passed. That point, however, is to be ascertained after the court takes jurisdiction. We are concerned now only with the question as to whether or not the pleadings make out a case within the jurisdiction of this court.

The claim that the question as to whether or not the

resolution referred to was passed conformably to the State statute was a question exclusively for the State court and was not a Federal question, is clearly untenable. The construction of a State statute by a State court may undoubtedly give rise to a Federal question. Indeed, such questions generally arise in that way. For instance, when it is claimed that a State statute is repugnant to that provision of the constitution against the enactment of State laws impairing the obligation of contracts, if such statute is so sustained by the State court as to give this court jurisdiction, it is nearly always done by holding that, as matter of construction, the statute does not impair the obligation of a contract, or by holding that a prior State statute claimed to be the contract impaired, ought not to be construed as a contract. No respectable State court would have the reckless and conscienceless temerity to hold that a statute which it construed to impair the obligation of a contract was in fact constitutional and valid. Will it be claimed that if a State statute plainly impairing the obligation of a contract should be construed by the highest State court as not having that effect, and should therefore be sustained, this court would not have jurisdiction to review that decision because, forsooth, it concerned merely the construction of a State statute? Unquestionably, if by the mere construction of a State statute under which a contract is made, or which itself constitutes the contract, a subsequent statute is upheld as not impairing the obligation of that contract, this court will take jurisdiction (*Bridge Props.* v. *Hoboken Co.*, 1 Wall., 116, 144). So if a State statute, or an authority exercised under the State, whereby a party is sought to be deprived of his property without "due process of law," or is denied "the equal protection of the laws," is construed by the highest State court as not having that effect, and is, therefore, up-

held, the jurisdiction of this court to review that decision is indubitable. The guaranty of "due process of law" would be worse than valueless if it could be evaded by the shallow device of holding as a matter of construction of a State statute that to be "due process of law" which plainly is not.

The claim of the learned counsel for the defendants in error that the legislature could, of its own sovereign will, authorize a public local improvement within a municipality and an assessment to pay for it by officers of its own selection, without consulting the municipality at all, is also clearly untenable under the authority of *People* v. *Lynch* (51 Cal., 34); *Taylor* v. *Palmer* (31 *Id.*, 252); *Brady* v. *King* (53 *Id.*, 44); *Schumacher* v. *Toberman* (6 Pac., L. J., 997); *People* v. *Chicago* (51 Ill., 17, 30); *Park Commissioners* v. *Common Council* (28 Mich., 228).

2. *Notice and hearing provided for in the statute whether in fact allowed.*

It is further averred in the complaint that the notices provided for in sections 6 and 7 of the statute were not in fact published and given as required (Transcript, fols. 9, 10, 18, 19). Here is a direct averment that the State, in making this improvement and assessment by officers of its own selection, did not award to the plaintiffs the "due process of law" guaranteed to them by the Federal Constitution, even conceding that the statute under which they acted provided for such "due process," and was therefore constitutional. Plainly, then, in this particular also, a Federal question sufficient to give this court jurisdiction is distinctly presented by the pleadings. The question as to whether or not the notices appear by the record to have been duly published, as the learned counsel for the defendants in error claims, is to be determined, of course,

after this court assumes jurisdiction, and is not material to the question as to whether it has jurisdiction or not.

The claim that the non-publication of the notice provided for in section 6 could not affect any constitutional right of the plaintiff, because that notice simply "apprised the property owners that the Board was organized, and invited them to present maps of their property and a statement of their claim of title," cannot be maintained.

The learned counsel concedes that this notice "set in motion the right of the property owners to arrest the improvement under sec. 12 of the act." This right, it is said, is not constitutional, because it was created by the statute. If it was a part of the "process of law," awarded by the statute and guaranteed by the Constitution, all the notice provided for was provided for by the statute. Does that fact make the right to notice any the less constitutional and sacred? When any valid statute provides for notice of a proceeding affecting the property of a citizen, if it is due notice it is within the guaranty of the Constitution. If it is not due notice, the statute is void. In either case, the Constitution furnishes ample protection to the citizen.

Inasmuch as one of the claims of the defendants in error is that the plaintiffs in error have debarred themselves from any right to object to the assessment, even if void, because they failed to take any steps to "arrest the improvement" before its completion, and as this notice provided for in section 6 is admitted to have "set in motion the right to arrest the improvement," the contention that the absence of such notice affected no constitutional right is certainly unique. The defendants in error, in effect, say to the plaintiffs in error: "You have no right to resist this assessment, even though it is utterly void and the statute itself unconstitutional, because you took no

steps to arrest the improvement before its completion." And when they answer that they never had the notice, provided by the statute, which was to set in motion their right to "arrest the improvement," they reply with the astounding declaration that the plaintiffs in error had no constitutional right to such notice. The bare statement of such a position serves a sufficient answer to it.

The claim that the question of the sufficiency of these notices, and of their publication, under the statute, is merely a question of the construction and effect of a State statute, and involves no Federal right, is sufficiently answered by what has been already said respecting a similar claim as to the sufficiency of the adoption of the resolution of the Board of Supervisors. A citizen cannot be deprived of "due process of law" by the mere construction of a State statute any more than by holding it to be valid when it is not, without bringing the case within the mischief provided against in the fourteenth amendment to the Constitution of the United States. If the statute in this case provides for sufficient notice, but such notice has not, in fact, been awarded, but the State, by its agents, has, nevertheless, gone on to exercise as valid the authority conferred by that statute, the mere fact that the State court has held that to be due notice, under the statute, which plainly is not, cannot deprive this court of jurisdiction.

3. *Misconduct and fraud of Commissioners rendering their proceedings* coram non judice *and void.*

Apart from the insufficiency of the adoption of the resolution of the Board of Supervisors and of the publication of the notices provided for by the act, we maintain that the various wrongful acts of the Commissioners alleged in the complaint as grounds for the injunction asked, such as the wilful adoption of grossly unjust and unequal rules

for the determination of the damages and the ascertainment and apportionment of benefits, the arbitrary addition of certain illegal and unauthorized items to the assessment, the collusive and fraudulent charges made after the report was completed in the assessments of certain parties to induce them to withdraw their objections to said report, the delegation of the functions of the Commissioners to certain experts, &c., the disqualification of one of the Commissioners on the ground of interest, the assessment of damages in excess of benefits, and the issuance of bonds in excess of the assessed damages, were all of such a nature as to deprive the Commissioners of jurisdiction to act, and to invalidate their authority, and, if sanctioned, amount to a denial to the plaintiffs of "due process of law," and of "the equal protection of the laws."

The authority under which this assessment was made, and the validity of which is here contested, is undoubtedly statutory, special, and limited, and required to be strictly pursued, and all acts in excess of that authority are necessarily as void as if no such authority had ever been conferred, and furthermore their validity, even though they are judicial in character, may be impeached collaterally for want, or excess, of authority or jurisdiction. This is the general rule as to a special limited and statutory authority, even when conferred upon a judicial tribunal (Cooley Tax (2d ed.), 526; 7 Rob. Pr., 67, 107, 109; Wells on Jurisdiction, sec. 70 *et seq.*; Boswell's Lessee *v.* Dickerson, 4 McLean, 262; Thatcher *v.* Powell, 6 Wheat., 127; Williamson *v.* Berry, 8 How., 495; Webster *v.* Reid, 11 *Id.*, 460; People *v.* Otis, 74 Ill., 384; Auditor-Gen. *v.* Pullman, &c., Co., 34 Mich., 59; Rogers *v.* Dill, 6 Hill, 415; *In Re* Smith, 10 Wend., 449; Guisebert *v.* Etchison, 51 Md., 487; Kelly *v.* Bemis, 4 Gray, 84; Folger *v.* Columbian Ins. Co., 99 Mass., 294; Harsham *v.* Taylor, 3 Jones (N. C.), 14;

Wood *v.* Stanberry, 21 Ohio St., 142; Chamberlain *v.* Cleveland, 34 Ohio St., 551; State *v.* Fond Du Lac, 42 Wis., 287; San Francisco, &c., Co. *v.* Alameda Water Co., 36 Cal., 644; Dorsey *v.* Barry, 24 *Id.*, 452; Whitney *v.* Delegates, 14 *Id.*, 503; Saunders *v.* Haynes, 13 *Id.*, 150; Mulligan *v.* Smith, 59 *Id.*, 206; Chollar, &c., Co. *v.* Wilson, 5 West Coast Rep., 276).

All the wrongful acts of the Commissioners above enumerated were, under this rule, in excess of the authority and jurisdiction conferred, and were therefore void.

The acts mentioned, and the assessment resulting therefrom, being wholly without jurisdiction, if permitted to stand as valid and to be enforced, will necessarily lead to a deprivation of property without "due process of law." Jurisdiction is exactly co-extensive with "due process of law" in such a case. And if any act is done without jurisdiction it is done without "due process of law."

Hence all the acts mentioned come within the inhibition of the fourteenth amendment to the Constitution of the United States; and as they all affect the "validity of an authority exercised under a State," they are alone sufficient to bring this case within the jurisdiction conferred by U. S. Rev. St., sec. 709.

It is claimed, however, by the learned counsel for the defendants in error that as to all these matters the parties aggrieved had a remedy by appeal to the county court, in the mode pointed out by the act, and are therefore concluded from any other relief.

We deny that any of the matters complained of were within the special and limited appellate jurisdiction conferred by the act in question upon the county court. The only person authorized by that act to appeal to the county court, as appears by section 8, was "any person interested in any piece or parcel of land, situated within the district

defined, * * * feeling himself aggrieved by the action or determination of said Board, as shown in said report," meaning the report of the Commissioners, when first completed and filed for inspection. None of the matters above enumerated were "shown in said report" when so filed, and, therefore, no person aggrieved thereby had any right of appeal under the act. The only matter mentioned, which could by any possibility be supposed to be shown in said report, was the interest of one of the Commissioners. His name would, of course, appear as that of the property owners, but evidence *aliunde* would be necessary to show that it was the same person as the Commissioner. And, besides, part of the property, in which he was indirectly interested, did not stand in his name. The erroneous rules of assessment and appraisement, the unwarranted addition of illegal items, and the delegation of authority to experts, did not appear in the face of the report. And so the collusion with objecting property owners did not, and could not, appear in the report as originally filed, because it happened afterwards.

The same may be said of the excess of damages over benefits, for there was no such excess when the report was so filed. It resulted from subsequent changes in some of the assessments. Neither did the report show that the aggregate amount of bonds greatly exceeded the amount of the assessment. Clearly, then, if the grievances mentioned were the only grievances of the plaintiffs, they were not such as to entitle them to appeal to the county court.

And even if the matters complained of had been "shown in said report," it was not within the limited jurisdiction of the county court, as marked out in this act, to afford any relief. The only appeal which could be made to the county court, as provided by section 8 of the act was "by

petition" to said court, "setting forth his (the petitioner's) interest in the proceedings had before said Board, and his objections thereto, *for an order on said Board requiring it to file with said court the report of said Board and such other documents or data as may be pertinent thereto, in the custody of said Board, and used by it in preparing said report.*"

Provision is then made for setting down said petition for hearing within ten days, for service of a copy of the petition on the Board, for an appearance and answer by the Board, for the taking of testimony on the hearing of said petition, and for compelling the attendance of witnesses, &c. It is then provided: "*It shall be in the discretion of said court, after hearing and considering said application, to allow said order or deny the same; and, if granted, a copy thereof shall be served on said Board, and it shall proceed* to obey the same according to the terms of the order to be prescribed by the Board." If no petition is filed, the section further provides that the Board shall "within the time above limited for the filing thereof" file its report with the said court with a petition for confirmation, nothing being said as to filing documents and data. The section then continues that "the court shall have power to *approve and confirm said report or refer the same back to said Board with directions to allow or modify the same in* the particulars specified" in the order so referring it. It is then provided that the Board shall make the alterations directed and then again submit the report to the court, and that the court shall confirm it if the alterations have been made as directed, but if not that it shall be again referred to the Board, "and so on," until the original order of modification had been complied with.

We submit that with the limited jurisdiction thus conferred upon it, the county court could not have afforded

an adequate remedy for the grievances alleged in the complaint because it had no power to reject the report entirely. It could only approve it or direct it to be modified in particulars mentioned in its order. It could not even compel the modifications to be made. If the Board refused to make them, the court could only continue referring the report back to them until they consented to alter it as directed.

That in cases of this sort the jurisdiction of the court to which an assessment for a local improvement is required to be submitted for confirmation extends no further than is expressly provided for in the statute, is well settled in *In re* Lange, 85 N. Y., 307, 310; *In re* Department of Public Parks, *Id.*, 463; New Haven *v.* Fair Haven, &c., R.R. Co., 38 Conn., 422, 429; State *v.* Road Commissioners, 41 N. J. L., 89.

As to radical objections against the assessment, going to its entire validity and to the authority to make it, the decree of confirmation by the confirming court is not conclusive, unless the confirming court is expressly clothed with jurisdiction to determine such objections (*In re* Department Public Parks, *In re* Lange, and New Haven *v.* Fair Haven, &c., R.R. Co., *supra*).

In this case, aside from the objections to the constitutionality of the statute, the insufficient adoption of the resolution of the Board of Supervisors, and the failure to publish the notices as prescribed, there are several others which could be remedied only by rejecting and annulling the entire assessment. For instance, the fact that the cost of the improvement and other assessed damages exceeded the ascertained benefit to the property owners assessed, precluded any assessment whatever. The act expressly provided that the city should not be liable for any part of the bonds, but that the whole amount should be paid out of

the assessment. And it is well settled that in such cases there is no power to make any assessment where the cost of the improvement exceeds the special benefits to the assessed property, and the entire cost is to be paid out of the assessment, but the proceedings should come to a stop (State *v.* Patterson, 37 N. J. L., 380, 383; State *v.* Hudson, 29 *Id.*, 104; State *v.* Newark, 36 *Id.*, 172; Passaic *v.* State, 37 *Id.*, 539; Matter of Drainage, 35 *Id.*, 502; Canal Bank *v.* Albany, 9 Wend., 244; Matter of Canal Street, 11 *Id.*, 154; Matter of Fourth Avenue, 3 *Id.*, 452; Crawford *v.* People, 82 Ill., 559; Chamberlain *v.* Cleveland, 34 Ohio St., 567).

The power to assess "benefited" property for a local improvement is founded upon, and limited by, the ascertained benefit, and, if the assessment exceeds the benefit, it is void *in toto*. See, in addition to the authorities above cited, 2 Dill. Mun. Corp. (3d ed.), 759; Cooley Tax (2d ed.), 19, 20, 663; Taylor *v.* Palmer, 31 Cal., 254; Creighton *v.* Manson, 27 *Id.*, 624; *In Re* Market St., 49 *Id.*, 546; Nichols *v.* Bridgeport, 23 Conn., 204; Minnesota *v.* Palmer, 20 Minn., 468; Macon *v.* Patty, 57 Miss., 383; Chicago *v.* Larned, 34 Ill., 203; Lee *v.* Ruggles, 62 *Id.*, 427; State *v.* Jersey City, 37 N. J. L., 128; Hanscom *v.* Omaha, 11 Neb., 37–41; Dyer *v.* Farmington, 70 Me., 522; Wistar *v.* Philadelphia, 80 Pa. St., 505; Hammett *v.* Philadelphia, 65 *Id.*, 151; *In re* Paving Tenth St., 4 East Rep., 341; Taylor *v.* Chandler, 9 Heisk., 366; Barnes *v.* Dyer, 56 Vt., 470; Donnelly *v.* Decker, 58 Wis., 464; Norfolk *v.* Ellis, 26 Grat., 246, per Anderson and Bouldin, J. J.

But it is not our purpose at this point to discuss the validity of the objection that the assessment exceeds the ascertained benefits. We desire simply to show that it is an objection which, if valid, annuls the entire assessment as being *coram non judice*, and thus involving the question

of "due process of law," a clearly Federal question, and that being an objection going to the validity of the entire assessment, it was not within the jurisdiction of the county court to try or determine it, because that court had only authority, at most, to approve or modify the report, and could not reject it as an entirety.

There are other objections, among those enumerated, which are equally radical and equally beyond the jurisdiction of the county court.

Thus the objection that one of the Commissioners was a party in interest, and therefore disqualified, if valid at all, strikes at the root of the whole assessment. The only way in which the defect could be remedied was by setting aside the assessment as an entirety and terminating the proceedings, because if it vitiated this assessment it vitiated it as a whole, and would equally vitiate any other assessment which the Board could make. It was, therefore, beyond the limited jurisdiction to try or determine that objection.

4. *Objections to the assessment raised by the pleadings, other than the objection of the unconstitutionality of the statute, are equally within the prohibition of the fourteenth amendment, and equally within the jurisdiction of this court to try.*

This point has already been somewhat discussed, but calls for some further consideration. Our contention is that, leaving out of view the question of the constitutionality of the statute, the other objections to the assessment, alleged in the complaint, also bring the case within the fourteenth amendment to the Constitution of the United States, as well as within U. S. Rev. St., Sec. 709, conferring jurisdiction upon this court. We have already shown that in making this assessment the Board of Commissioners

were acting as the representatives and agents of the State, and that their action was the action of the State. If they have by their malfeasance and non-feasance denied to the plaintiffs "due process of law," or "the equal protection of the laws," it is to be deemed the act of the State within the prohibition of the fourteenth amendment (*Ex parte* Virginia, 100 U. S. 339, 347; *Virginia* v. *Rives*, *Id.*, 313, 319). In these two cases it was expressly held that the prohibition in the fourteenth amendment applies to a denial of "due process of law," or of "the equal protection of the laws," by any department or agency of the State. In *Ex parte* Virginia, Strong, J., says: "Whoever, by public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State had clothed one of its agents with power to annul or to invade it."

In Virginia *v.* Rives (100 U. S., 313, 319) it is held that the fourteenth amendment is broader in this respect than Sec. 641 of the Revised Statutes, authorizing the removal of causes from State to Federal courts, or, in other words, that a case may be within the prohibition of the fourteenth amendment as involving a denial of "due process of law," without being subject to removal from a State to a Federal court under U. S. Rev. St., Sec. 641.

There is no difficulty of that sort in this case, under Sec. 709 of the United States Revised Statutes. That section gives this court jurisdiction "where is drawn in question the validity of a statute of, or an authority *exercised under, any State, on the ground of their being* repugnant to the

Constitution * * * of the United States." Here, independently of the question of the validity of the statute, there is "drawn in question," by the explicit averments of the complaint, "the validity of an authority exercised" under the State of California.

The Board of Commissioners were agents of the State, and exercising an authority over it. The complaint avers the invalidity of that authority, whether the statute is valid or not, by reason of failure to comply with provisions therein essential as conditions precedent to the making and confirmation of the assessment, and by reason of flagrant misconduct of the Commissioners, whereby they exceeded their jurisdiction and rendered their proceedings absolutely void.

VI.

FINDINGS OF SUPERIOR COURT SHOW UNCONSTITUTIONALITY OF STATUTE AND OTHER FEDERAL QUESTIONS ACTUALLY AND NECESSARILY INVOLVED AND DECIDED IN THAT COURT.

The court below expressly finds, as a conclusion of law, "that the said act of the legislature was, and is, unconstitutional and void; that the said action of the said Board of Commissioners was, and is, wholly unauthorized and void," &c. (Transcript, fols. 422, 423).

There are also explicit findings, showing that the resolution of the Board of Supervisors was never legally adopted, because not published with the ayes and noes, and not signed by the President of the Board as required by the consolidation act, which constitutes the charter of the city; that the notice required by sections 6 and 7 of the act was never legally published; that the Board of Commissioners were guilty of the wrongful acts alleged; and that

one of the Commissioners was disqualified by interest as averred.

The decree of the superior court, among other things, adjudges that "the pretended assessment, commonly called the Dupont street assessment, mentioned in the complaint herein, is wholly unauthorized, illegal and void" (Transcript, fol. 444).

The findings and decree of that court thus incontestably show that all the Federal questions insisted upon by the plaintiff in error were in fact, and of necessity, involved in the decision, and actually decided in the superior court. The reversal of that decision by the supreme court necessarily involved a counter decision of the same questions, and even if we had nothing more to guide us, the conclusion that those questions were "necessarily involved" in the final decision would be irresistible.

VII.

CERTIFICATE OF CHIEF-JUSTICE THAT THE FEDERAL QUESTIONS WERE DRAWN IN QUESTION, TAKEN WITH THE RECORD OF THE COURT BELOW, IS CONCLUSIVE.

The certificate of the chief-justice of the supreme court of the State, by authority of the court, showing that a particular Federal question was raised and decided adversely to the Federal right claimed, which appears in this case, though not alone conclusive, is entitled to great weight in determining the question of jurisdiction. On this point Clifford, J., says, in Caperton *v.* Bowyer (14 Wall., 234): "Undoubtedly such a certificate is entitled to much weight, as showing that the question was decided by the court which gives it, and in the manner required to give jurisdiction, but it is not conclusive to show that the

question was raised in the case, as the latter question may depend upon the construction of the pleadings, or, as in this case, upon the proper construction of the language of the bill of exceptions."

To the same effect is Parmelee *v.* Lawrence (11 Wall., 38).

The rule is that if the pleadings are such as to show that the Federal question might have arisen then, the proper certificate that it did arise and was decided in the way required by the act of Congress, it is conclusive in favor of the jurisdiction of this court.

Armstrong *v.* Athens Co., 16 Pet., 281.

In that case Catron, J., says: "In the case now before us, the presiding judge of the supreme court of Ohio has certified on the record that the validity of a statute of the State was drawn in question, on the ground that it was repugnant to the Constitution of the United States, and that the decision was in favor of the validity of said statute; and this certificate of the judge is certified by the clerk, as a part of the record. We presume that the certificate of the presiding judge was made by the authority of the court; and as this *bill and answer show that such a point might have arisen, and this certificate on the record states that it did arise, and was decided, the case comes within the fourth clause above mentioned, and this court must take jurisdiction, and examine whether the point so certified was rightfully decided.*"

So, in Detroit Co. *v.* Guthard (114 U. S., 137), where it appeared that a Federal "right, title, privilege, or immunity" might have been "set up" and "claimed," although there was nothing in the record to show it was, Mr. Chief-Justice Waite said that "*if the court below had certified in proper form that it was, and that it was denied, we could*

have taken jurisdiction. The court has, however, not only not made such a certificate, but it has expressly refused to do so upon application specially made for that purpose. All this appears affirmatively on the motion papers." Jurisdiction was therefore declined.

In Missouri, &c., R.R. Co. *v.* Rock (4 Wall., 177), cited here by the learned counsel for the defendants in error, there *was a certificate made two years after the decision in the* State court that the validity of a provision of the constitution of Iowa was drawn in question as being repugnant to the Constitution of the United States, but there was nothing else in the record to sustain this statement. And in the *Supreme Court of the United States there was no attempt, by the counsel for the plaintiff in error, to show that the validity of any provision of the constitution of Iowa was drawn in question on the ground of repugnancy to the Federal Constitution*, as Mr. Justice Miller states, but the case was put entirely upon another ground, which it was erroneously claimed would sustain the jurisdiction. Under these circumstances the court held that there was no jurisdiction. The facts of the case render it entirely reconcilable with the doctrine quoted *supra* from Armstrong *v.* Athens Co.

In Lawler *v.* Walker (14 How., 149, 154, 155), also cited by the learned counsel for the defendant in error here, jurisdiction was declined, although there was a certificate that the validity of a statute was drawn in question on the ground of repugnancy to the Federal Constitution; but the certificate was insufficient in not stating what statute was meant. Besides it seems that it appeared otherwise from the record that the State court simply construed a statute of the State "which neither of itself, nor by its application, involved in any way a repugnancy to the Constitution of the United States." That case, also, is entirely

reconcilable with the doctrine quoted from Armstrong *v.* Athens Co. (*supra*).

In the present case, conceding that the pleadings do not of themselves, as we insist that they do, necessarily involve the validity of the statute on the ground of repugnancy to the Federal question, or any other Federal question, such a question might undoubtedly arise under the pleadings. The certificate, therefore, under the doctrine of *Armstrong* v. *Athens Co.*, was sufficient to confer jurisdiction.

VIII.

OPINION OF SUPREME COURT OF THE STATE, WHICH IS A PART OF THE RECORD, CONCLUSIVELY SHOWS THAT A FEDERAL QUESTION WAS ACTUALLY AND NECESSARILY RAISED AND DECIDED ADVERSELY TO THE FEDERAL RIGHT.

Prior to the enactment of the act of Congress of Feb. 5, 1867, and the amendment of the rules of this court in 1873 by inserting subdivision 2 of rule 8, it had been held that, except as to cases coming up from the highest court of Louisiana, the court would not look into the opinion of the State court for the purpose of ascertaining whether or not a Federal question was involved so as to give jurisdiction under the 25th section of the judiciary act of 1789, unless by agreement of counsel and by the consent of the court such opinion was, for that purpose, treated as part of the record (*Williams* v. *Norris*, 12 Wheat., 117; *Rector* v. *Ashley*, 6 Wall., 142; *Kennebec R.R.* v. *Portland R.R.*, 14 *Id.*, 25.)

A contrary rule was established with respect to cases coming up from Louisiana because, under the law and and practice of that State, the opinion was part of the

record (*Grand Gulf, &c., Co.* v. *Marshall*, 12 How., 165, 167, 168; *Cousin* v. *Blanc's Exec.*, 19 *Id.*, 202; *Delma* v. *Insurance Co.*, 14 Wall., 667; *Crossley* v. *New Orleans*, 108 U. S., 105).

In the act of February, 1867, however, certain restrictive language in the act of 1789, compelling the court to look only "to the record" in determining the question of jurisdiction, was omitted, and as a result this court has since manifested a growing inclination to look into the opinion of the State court when properly certified and sent up with the record in order to determine from that, in connection with the rest of the record, whether or not any Federal question has been raised and decided. While not regarding the opinion alone as conclusive, the disposition of the court has been to give it considerable weight. The case in which this doctrine was first laid down was Murdock *v.* Memphis (20 Wall., 633). In that case Mr. Justice Miller, after pointing out the difference between the acts of 1789 and 1867, said: "It is probable that, in determining whether one of those questions (Federal questions) was actually raised and decided in the State court, this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry to the face of the record (Williams *v.* Norris, 12 Wheat., 117; Rector *v.* Ashley, 6 Wall., 142). What was the record of a case was pretty well understood as a common law phrase at the time that statute was enacted. But the statutes of the States and new modes of proceedings in those courts have changed and confused the matter very much since that time. It is in reference to one of the necessities thus brought about that this court long since determined to consider as part of the record the opinion delivered in such cases by the supreme court of Louisiana (Grand Gulf R.R. Co. *v.* Marshall, 12 How., 165; Cousin *v.* Blanc's Exr., 19 *Id.*, 202).

"And though we have repeatedly decided that the opinions of other State courts cannot be looked into to ascertain what was decided, *we see no reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question.* We have been in the habit of receiving the certificate of the court, signed by its chief-justice or presiding officer, on that point, though not as conclusive, and those opinions are quite as satisfactory, and may more properly be treated as parts of the record than such certificates.

"But, after all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry; and, while we are not prepared to fix any absolute limit to the sources of the inquiry under the new act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

This doctrine is referred to with approval in Moore *v.* Mississippi (21 Wall., 638), where it was determined that the court would not be governed upon this point solely by the fact that the opinion of the State court showed that a Federal question was raised and decided, there being nothing in the rest of the record to show any such thing.

In April, 1873, an amendment was adopted to the rules of this court, adding thereto what is now subdivision 2 of rule 8, as follows: "In all cases brought to this court, by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case."

Since that amendment, when the opinion of the court of last resort in the State is sent up duly certified with the record, in a case of this sort, in accordance with that rule,

it is the practice of the court to look into it with the rest of the record in determining the question of jurisdiction (Bolling *v.* Lersner, 91 U. S., 595; Warfield *v.* Chaffe, *Id.*, 691; Boughton *v.* Exchange Bank, 104 *Id.*, 427, 428; Philadelphia, &c., Assoc. *v.* New York, 119 *Id.*, 116; Gross *v.* United States Mortgage Co., 108 *Id.*, 477; Des Moines, &c., Co. *v.* Homestead Co., 123 *Id.*, 552, 555).

In the case last cited this court, indeed, not only looked into the opinion in the State court, but considered the oral argument in that court, as well as the briefs filed in another case argued with the principal case, for the purpose of ascertaining whether or not the Federal question was raised and decided, and sustained the jurisdiction, although it appeared that the State court had in fact refused to consider that question. In that case there was pleaded, among other defences, a former adjudication of the Supreme Court of the United States between the same parties upon the same question. To this defence it was replied that the courts of the United States had "no jurisdiction of said suit and no legal power or authority to render said decree or judgment."

The supreme court of the State in its opinion, which was embodied in the record, refused to consider this defence because it was not presented in the briefs, although presented and urged in the oral argument. The Supreme Court of the United States held, however, that from the pleadings, the opinion of the court, the oral argument, and the briefs of counsel in other cases heard in connection with the case at bar, it appeared that the question presented by that defence was before the court, and that the decision was practically against the Federal right, and that, therefore, the case was within the jurisdiction of the Supreme Court of the United States.

Mr. Chief-Justice Waite, delivering the opinion in the

case, said: "It seems from the opinion, which, as part of the *record, we must take notice of, that this case was argued* in connection with that of the administrator of Mrs. Grace H. Litchfield. The defence of prior adjudication was made in both, though the facts in the case of Mrs. Litchfield were different from those in this. Mrs. Litchfield was not an actual party to the suit in which the prior adjudication was had, while the Navigation and Railroad Company was; but the question of the jurisdiction of the court for the determination of the rights of the parties was the same in both. In the oral argument, there being but one for the two cases, this point was raised and *discussed, but in the printed briefs it was referred to only in that entitled in the suit of the administrator of Mrs. Litchfield.* As it was the defence in this case, and, if sustained, made it unnecessary to consider anything else, *we cannot decide that the court was justified in holding that it could not be determined. Such action was in our opinion equivalent to decision against the Federal right, which was actually set up and claimed, and thus our jurisdiction for the review of the judgment on this question, as well as the others, is complete.*"

And where by the laws of the State from which the case comes to this court the opinion of the court is required to be delivered in writing, filed, and recorded, it is still clearer that if properly certified up with the record to this court it should be consulted as part of the record for the purpose of determining whether or not a Federal question has been raised and decided, so as to give this court jurisdiction (Gross *v.* United States Mortgage Co., 108 U. S., 447; S. C., 2 Sup. Ct. Rep., 940; Detroit R. Co. *v.* Guthard, 114 *Id.*, 137). In Gross *v.* United States Mortgage Co., Mr. Justice Harlan states that the question as to whether or not any Federal right was involved in the de-

cision of the Illinois supreme court "depends upon the inquiry whether the opinion of the State court, which is made part of the transcript, can be examined for the purpose of ascertaining the grounds upon which that court based its final decree."

After reviewing Gibson *v.* Chouteau (8 Wall., 317), Rector *v.* Ashley (6 *Id.*, 142), Williams *v.* Norris (12 Wheat., 117), Parmelee *v.* Lawrence (11 Wall., 38), Lawler *v.* Walker (14 How., 149), Missouri, &c., R.R. Co. *v.* Rock (4 Wall., 180), and Murdock *v.* Memphis (20 *Id.*, 633), quoting at length from the latter case, the learned justice concludes as follows upon this point: "The opinion of the State court, in the present case, is properly authenticated, and there is, in addition, the certificate of its chief-justice, showing that the present plaintiff in error not only claimed that the deed of trust by the National Life Insurance Company gave, when executed, a lien superior to that asserted by the United States Mortgage Company under Lombard's mortgage, but that the act of the legislature of Illinois in force July 1, 1875, in so far as it attempted to validate mortgages, such as the one taken by that company from Lombard, was in conflict as well with the contract clause of the Constitution of the United States as with that part of the fourteenth amendment which prohibits a State from depriving a person of property without due process of law; further, that the latter claim was decided adversely to plaintiff in error.

"We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the supreme court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the State court adversely to a right, title, or immunity under the Constitution or laws of the United States, and

specially set up and claimed by the party who brings the writ. Any difficulty existing upon this subject is removed by that provision of the revised statutes of Illinois which requires, not only that the justices of the supreme court of the State shall deliver and file written opinions in the cases submitted to it, but that such opinions shall also be spread at large upon the records of the court (Rev. St. Ill., 1874, 327, c. 37, sec. 16).

"This statutory provision would seem to bring the case within the rule which permits an examination of the opinions of the supreme court of Louisiana, to ascertain whether the case was determined upon any ground necessarily involving a Federal question, within the reviewing, however, of this court."

Where there was no State statute making the opinion of the State court a matter of record, this court held (Otis *v.* Oregon Steamship Co., 116 U. S., 548, quoting Moore *v.* Mississippi, 21 Wall., 636, 639): "If the record shows on its face that a Federal question was not necessarily involved, and does not show that one was raised, we will not go out of it to the opinion elsewhere to ascertain whether one was in fact decided." In Otis' case, as Waite, C.-J., further says, there was "not in the record the least suggestion of a Federal question," and, further, that "the only issue in the case was as to the agency, and that did not depend on the Constitution or any law of the United States."

That case went up from New York. Compare with it the later case of Philadelphia, &c., Assoc. *v.* New York (119 U. S., 116), in which it was held as follows, Blatchford, J., delivering the opinion: "In view of what was said in Murdock *v.* Memphis (20 Wall., 590, 633), in Gross *v.* United States Mortgage Co. (108 U. S., 477), and in Adams County *v.* Burlington, &c., R.R. Co. (112 U. S.

123), we think that we are at liberty to look into the opinion of the court of appeals, a copy of which, duly authenticated by the proper officer, is transmitted to us with the record, in compliance with our 8th rule, for the purpose of aiding in determining what was decided by that court."

The true explanation of the Otis case seems to lie in the fact that it did not appear from the record, outside of the opinion, that any Federal question could have been raised, but, on the contrary, that the only issue in the case did not involve any such question. Even in a case going up from Louisiana, it was held in Citizens' Bank *v.* Board of Liquidation (98 U. S., 140, 142), that this court would not look into the opinion of the State court to see whether a Federal question was, in fact, decided, where the pleadings did not raise any such question, and the record clearly showed that no such question was necessarily involved. Several defences were pleaded in that case, none of them, in terms, involving any Federal question. One of them, which involved no such question, was sustained, and terminated the case.

This court, therefore, held that it had not jurisdiction.

The cases, on this point, are not, perhaps, entirely reconcilable, but, taking them as a whole, we think that they establish the doctrine that, where the opinion of the State court is certified up with the record, even though no State law makes it a matter of record, this court will look into it in determining whether a Federal question was involved, if the pleadings are such that such a question might arise, and there is nothing in the record, outside of the opinion, to negative the supposition that such a question was involved; and that where, by State law, the opinion is a matter of record, it will be still more freely consulted.

In this case the opinion is properly certified up with the

record. And, furthermore, the constitution and laws of the State require all opinions of the supreme court to be in writing (Cal. Const., art. vi, sec. 2; Code Civ. Proc., secs. 49, 53).

The statutes, furthermore, authorize the court to "make rules not inconsistent with the laws of the State, for its own government and the government of its officers" (Code Civ. Proc., sec. 129). The court has accordingly made a rule providing that "all opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk" (Rule 19).

The effect of this rule, and of the statutory and constitutional provisions referred to, is clearly to make the opinion of the supreme court matter of record. It is clearly intended also that the opinion in any given case should accompany the judgment. Thus, by Rule 21, it is provided that "when a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the *remittitur* to the court below."

In these circumstances it is clear that the opinion of the State court in this case should be treated as a constituent part of the record for the purpose of determining the jurisdictional question presented in the motion to dismiss.

This conclusion is strengthened by the fact that, by reference, the opinion is made, in a sense, a part of the judgment of the State supreme court.

The judgment entry recites: "And now at this day this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court is delivered by Temple, J.," &c.

Aside from the opinion the rest of the record shows, as we maintain, that a Federal question was necessarily involved in the decision rendered. The pleadings in connec-

tion with the judgment sufficiently show this. But if we are wrong in this, it is beyond controversy that such a question might have been raised under the pleadings, and there is nothing anywhere in the record negativing the supposition that it was raised. Looking into the opinion, as the court is authorized to do in such circumstances, it appears that the Federal question only was raised and decided, and that the decision of it controlled the case, the judgment being rested by the majority of the court solely on grounds involving the decision of that question. Striking out that question from the opinion of the majority there is no decision whatever in the case, the other points determined being merely subsidiary to that, and proceeding upon the ground that the Federal question has been decided adversely to the plaintiffs in error. The Federal question is thus necessarily involved in the decision rendered in the most rigorous sense of those terms.

IX.

Whether Federal question must be "necessarily involved."

As heretofore intimated, we deny that, in order to give this court jurisdiction in this class of cases, it must appear that a Federal question was "necessarily involved" in any such sense, as that the case could not have been decided at all without deciding that question. If the question was in fact raised and decided, or if its decision was necessarily involved in the judgment and decision *actually rendered*, it certainly is enough. The position is thus tersely stated by Mr. Chief-Justice Waite in *Bolling* v. *Lersner* (91 U. S., 594): "To give us jurisdiction, it must appear that such a question (*i. e.*, a Federal question) *was*

in fact decided or that its decision was necessarily involved in the judgment or decree as rendered." The rule is stated in the same, or substantially similar, terms in many other cases (*Murdock* v. *Memphis*, 20 Wall., 590, 636; *Bridge Proprs.* v. *Hoboken Co.*, 1 *Id.*, 142, 143; *Chouteau* v. *Gibson*, 111 U. S., 200; *Adams Co.* v. *Burlington, &c., R.R. Co.*, 112 *Id.*, 127; *Detroit R. Co.* v. *Guthard*, 114 *Id.*, 136). Indeed, as heretofore stated, the record need not show that the question was raised expressly and in terms. The true test is "whether such a question was *actually decided* and decided *adversely* to the Federal right" (*Murray* v. *Charleston*, 96 U. S., 432, 442). We find the statement, indeed, in a number of cases cited here by the learned counsel for the defendants in error, that the Federal question must be "necessarily involved." But, as clearly appears when we examine the facts of those cases, this certainly does not mean that the question must be "necessarily involved" in any such sense as that the case could not have been determined at all without deciding that question. It means no more, at most, than if the question was not *actually* raised and decided it must appear to have been "necessarily involved" in the decision or "judgment as rendered;" or, in other words, that that particular decision could not have been rendered without expressly or implicitly deciding the Federal question (*Brown* v. *Atwell*, 92 U. S., 327, cited for the defendants in error). In some of the cases it is simply decided affirmatively that, if the Federal question *does* appear to have been "necessarily involved," it is sufficient (*Murray* v. *Charleston*, 96 U. S., 432, 442). In other cases it is held that, if the record shows affirmatively that a Federal question was not necessarily involved, and does *not* show affirmatively that one was raised, the court will decline jurisdiction (*Moore* v. *Mississippi*, 21 Wall., 636, 638, 639; *Otis* v. *Oregon Steamship Co.*, 116 U.

S., 548, 550). The case last cited should be read in connection with another case appearing in the same volume, in order to arrive at the true doctrine of the court upon this subject (*Eureka, &c., Co.* v. *Yuba Co.*, 116 U. S., 410). In that case it was claimed that the decision of the State court involved a denial of "due process of law" within the inhibition of the fourteenth amendment, and, although it did not appear affirmatively that the point was presented below, Mr. Chief-Justice Waite, for the court, said: "Yet that point is made here, and *it is possible that its decision was necessarily involved in the final order that was made.* For this reason the motion to dismiss is overruled." It is true, that a motion to affirm was there granted, because the decision of the Federal question by the State court was so clearly right as to preclude the necessity of further argument. But the case is, nevertheless, a strong authority for us here on the jurisdictional question. It shows that it is not essential to the jurisdiction that it should appear absolutely that the Federal question was "necessarily involved," even in the decision actually made, but that it is sufficient, if it appears "possible," that the question was "necessarily involved" in the decision so made.

In the case at bar, however, there is, as we have seen, no difficulty in sustaining the jurisdiction, whatever meaning may be assigned to the terms "necessarily involved." Using those terms in the most extensive sense, it appears from the record that they are satisfied in this case. Every ground upon which the assessment is assailed in the complaint involves a question of jurisdiction, a question of "due processs of law," a Federal question, and the case could not, as we maintain, have been decided in any way, or in favor of either party, without deciding that question. But if the words "necessarily involved" mean simply that

it must appear that the Federal question was *actually* raised and decided, or was "necessarily involved" in the decision *actually* rendered, the case is absolutely perfect in favor of the jurisdiction. As we have already suggested, strike out the Federal question in this case and there is no decision left. There remains only, to sustain the dismissal of the complaint and the dissolution of the injunction, the opinion of a solitary judge in a court of seven judges, an opinion based upon a ground which is obviously, and beyond any question, untenable.

X.

Whether case involves other than Federal questions, and effect thereof.

The learned counsel for the defendants in error claims in his brief on this motion that, whether there is any Federal question involved in this case or not, it certainly involves other questions not Federal, broad enough to sustain the decision, and that in such a case the rule of this court is that it will not take jurisdiction, although the state court has decided only the Federal question, citing *Moore* v. *Mississippi* (21 Wall., 636), and a few other cases affirming the general doctrine of that case. We deny that the rule of this court is as stated; but we maintain, also, that even if it were the rule it would not defeat the jurisdiction in this case. It has undoubtedly been held that where a case brought to this court on error from a State court involves two questions, one Federal, and one not, and the latter question only appears to have been decided by the State court, this court will decline jurisdiction (*Adams Co.* v. *Burlington, etc., R.R. Co.*, 112 U. S., 123, 128; *Kennebec R.R.* v. *Portland R.R.*, 14 Wall., 25). So

it has been held in such a case that where both questions have been decided by the State court, and both are broad enough to sustain the judgment, the court will decline jurisdiction, even though both questions have been decided erroneously (*Murdock* v. *Memphis*, 20 Wall., 590). So it has been intimated, as suggested by the learned counsel for the defendants in error, that, in such a case, even where the Federal question alone appears to have been decided, this court will not take jurisdiction (*Moore* v. *Mississippi*, 21 Wall., 636. See also *Rector* v. *Ashley*, 6 *Id.*, 147). But the contrary is expressly adjudged in *Delmas* v. *Insurance Co.* (14 Wall., 667), where it is held that, if in such a case the State court distinctly bases its decision on the ground involving the Federal question, although it might have based it on the other, the jurisdiction of this court attaches. In *Klinger* v. *Missouri* (13 Wall., 257, 263), the following rule upon this subject is formulated by Bradley, J., from previous decisions of the court: "Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law

raising the Federal question, and this court will then take jurisdiction."

Since the decision in *Baltimore, &c., R.R. Co.* v. *Maryland* (20 Wall., 643 ; S. C. 21 *Id.* 456), we understand that that case furnishes the rule upon this subject. That was an action by the State against the Baltimore & Ohio Railroad Company to recover one-fifth of the gross receipts of that company for transportation in accordance with an act of the legislature. The defendant set up as a defence that the act in question was repugnant to the Constitution of the United States. The court below gave judgment for the plaintiff, which was reversed by the court of appeals. The defendant then brought error to this court. The opinion of the court of appeals, which was incorporated in the record, showed that the court was unanimous in holding the act in controversy to be constitutional, and that a majority of the court also placed their judgment on the non-Federal ground that the railroad company having acted as the agent of the State to collect money from passengers could not, in this action, avail itself of the illegality of their act in demanding and receiving it. A motion to dismiss was overruled. Miller, J., delivering the opinion, said : "Some of the decisions of this court, under the acts of 1789, would undoubtedly justify the view taken by the counsel of the defendant in error in support of the motion to dismiss if it were very clear that the second proposition on which the court of appeals placed its judgment was sufficient to control the case and that it involved no consideration of Federal law.

"But the act of 1789 contained restrictive language not in the act of 1867 ; and in construing the statute as it now stands we have ruled in the case of *Mindock* v. *Memphis*, just decided, that *where the Federal question has been raised, and has been decided against the plaintiff in error, the juris-*

diction has attached and it must be heard on the merits. To what this examination on the merits shall extend we have in that opinion considered. *But until we have determined that the State court decided erroneously the Federal question which it did decide we can go no further in the re-examination.*

"The counsel of both parties in this court are entitled to be heard, when the record shows the existence of a decision which gives jurisdiction, on the soundness of that decision, on its sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided, to affirm the judgment, even if the Federal question was erroneously decided."

Substantially similar doctrine to that of the foregoing case is laid down in *Des Moines, &c., Co.* v. *Iowa Homestead Co.* (123 U. S., 552, 553) heretofore cited in another point. In that case, one of the defences was based upon a former adjudication of the Supreme Court of the United States upon the same question between the same parties. To this defence it was replied that the former adjudication referred to was null and void, because the courts of the United States had "no jurisdiction of said suit, and no legal power or authority to render said decree or judgment;" thus raising a Federal question. There were also other defences pleaded, the same as in *Stryker* v. *Crane* (123 U. S., 527), *Chapman* v. *Crane* (*Id.*, 540), and *Litchfield* v. *Crane* (*Id.*, 549), which did not involve any Federal question. The court, however, held that the defence of the former adjudication, being the principal defence in the case, and one which, if sustained, rendered the consideration of every other defence unnecessary, and the decision of the supreme court of the State being against that defence, the Supreme Court of the United States had jurisdiction, although the supreme court of the State had

refused to consider that defence, because, though pleaded and discussed in the oral argument, it was not presented in the briefs.

In Minnesota *v.* Batchelder (1 Wall., 109), which was prior to the act of 1867, it was held, as stated in the syllabus, that, although a case, brought to this court on error from a State court, appears to have been disposed of generally on other grounds involving no Federal question, yet if an act of Congress is technically in issue in the pleadings, or is relied on therein, and decided against by rulings asked and refused, this court would have jurisdiction under section 25 of the judiciary act of 1789.

The case of *Moore* v. *Mississippi* (21 Wall., 636), relied on by the defendant in error here as an authority in point, is *sui generis*. The indictment there contained two events, charging distinct offences, and only one of them involved any Federal question. Deciding the Federal question, therefore, could not decide the whole case. Reversal of the conviction on the Federal ground would still leave the judgment as to the non-Federal court unaffected.

Upon this view of the authorities it is clear that, conceding it to be true for the sake of the argument that the case here does involve, in addition to the Federal question, a non-Federal question sufficiently broad to sustain the decision, it would not divest the jurisdiction of this court, because, in the first place, the decision was not rested on the non-Federal ground by a majority of the court, but only by a single judge; and, besides, if a majority of the court had put their judgment on the non-Federal as well as the Federal ground it would not have affected the jurisdiction, under the doctrine of *Baltimore, &c., R.R. Co.* v. *Maryland*, heretofore cited.

But the non-Federal ground suggested by Mr. Justice McKinstry was not sufficient to sustain the decision, even

if his opinion had been concurred in by a majority of the judges, and was entirely untenable.

The learned justice's position is as follows : 1. He holds that if the statute is valid, but the irregularities complained of in the proceedings of the Commissioners render the assessment invalid for want of jurisdiction, each of the plaintiffs had a plain, speedy, and adequate remedy at law by *certiorari*, and could not resort to an injunction. We deny that *certiorari* was or could be an appropriate remedy here, because *certiorari* brings up only what appears of record, and the wrongful and fraudulent act of the Commissioners here complained of were matters *aliunde*, the record not remediable by *certiorari* (Cooley's Tax, 2d. ed., 784 ; *Balfour* v. *Portland*, 28 Fed., 739 ; *Chicago*, &c., *R. R. Co.* v. *Cole*, 75 Ill., 592 ; *Porter* v. *Rock Island*, &c., *R.R. Co.*, 76 *Id* , 561 ; *Foote* v. *Milwaukee*, 18 Wis., 284 ; *Marsh* v. *Clark*, 42 *Id.*, 502). And besides the position as stated itself renders it necessary to decide in the just place the constitutionality of the statute, because if the the statute is void the irregularities in the proceedings become immaterial.

2. Judge McKinstry holds also that if the statute is unconstitutional and void each of the plaintiffs still had a remedy by *certiorari*, and that an injunction will not lie to prevent the collection of a void assessment. It is settled by an overwhelming array of authorities that an injunction will lie to prevent the enforcement of an assessment absosolutely void, because levied under an unconstitutional statute, or for any other reason where, as here, it is necessary to prevent a multiplicity of suits, arising from the number of those affected by the assessment, or from the fact that the assessment is payable in numerous installments covering a long period (Coulson *v.* Portland, 1 Deady, 494 ; 1 Pom. Eq., sec. 270 ; 2 Burr. Tax, sec. 143 ;

Dundee, &c., Co. *v.* School District, 19 Fed. Rep., 359, 364; S. C., 21, *Id.*, 151; Albany City National Bank *v.* Maher, 20 Blatch., 341; City National Bank, 2 Flipp, 61; Louisville R.R. Co. *v.* Gaines, *Id.*, 639; Greedup *v.* Franklin Co., 30 Ark., 101; Harward *v.* St. Clair Drain Co., 51 Ill., 130; Carlton *v.* Newman, 77 Me., 411; Holland *v.* Mayor, 11 Md., 186; South Platte Land Co. *v.* Buffalo Co., 7 Neb., 253; Wood *v.* Draper, 24 Barb., 187; Tarbox *v.* Hortenstein, 4 Baxt., 78; Sherman *v.* Benford, 10 R. I., 563; Blassing *v.* Galveston, 42 Tex., 641, 654; George *v.* Dean, 47 *Id.*, 73; Kuhn *v.* Board of Education, 4 W. Va., 508; Correthus *v.* Board of Education, 16 *Id.*, 541; Christie *v.* Malden, 23 *Id.*, 671; Bull *v.* Read, 13 Grat., 86).

Indeed, this very equity of the prevention of a multiplicity of suits obviously renders injunction, and not *certiorari*, the only proper and adequate remedy here.

But aside from that, it has often been held that the collection of an assessment under an unconstitutional statute, or otherwise void, may be enjoined without putting it upon a specific equitable ground (Woolsey *v.* Dodge, 6 McLean, 142; City National Bank *v.* Paducah, 2 Flipp, 61; Louisville, &c., R.R. Co. *v.* Gaines, *Id.*, 621; Waters, &c., Co. *v.* Little Rock, 39 Ark., 412; Greencastle *v.* Black, 5 Ind., 557; Lafayette *v.* Jenners, 10 *Id.*, 70; Langworthy *v.* Dubuque, 13 Iowa, 86; Smith *v.* Osburn, 53 Id., 475; Barber *v.* Farr, 54 *Id.*, 58; Baltimore *v.* Horn, 26 Md., 194; Mayor *v.* Porter, 18 *Id.*, 284; Wood *v.* Draper, 24 Barb., 187; Teegarden *v.* Davis, 36 Ohio St., 602, 603; Page *v.* Allen, 58 Pa. St., 338; Washington Avenue, 69 *Id.*, 352; Johnson *v.* Drummond, 20 Gratt., 419; Foster *v.* Kenosha, 12 Wis., 616.

It is clear, also, that the injunction may be sustained in this cause because of the frauds alleged to have been perpetrated by the commissioners upon the plaintiffs and

other property owners assessed. Fraud is a favored ground of equitable relief. No authorities need be cited upon that point.

Mr. Justice McKinstry and the learned counsel for the defendants in error cite Ewing *v.* St. Louis (5 Wall., 413), Houghton *v.* Austin (47 Cal., 646), and Dean *v.* Davis (51 *Id.*, 406), to show that where an assessment or other burden on property is absolutely void, because imposed under an unconstitutional statute, or the like, it cannot cast a "cloud" upon the title, and that therefore an injunction will not lie to prevent its enforcement or collection.

This point has already been somewhat considered, but a few additional observations thereon will not be amiss. In the first place, none of the decisions cited hold that an injunction would not lie in such a case, if there was any other independent ground for equitable relief than the prevention of a "cloud" upon the plaintiff's title, such as the prevention of multiplicity of suits, fraud, or the like.

The cases cited by us show that an injunction will lie for such other independent ground of equitable relief, even though the statute be unconstitutional, and though it be admitted that, for that reason, the act to be enjoined cannot cast a "cloud" on title. The cases of Houghton *v.* Austin and Dean *v.* Davis simply follow on this point; Savings, &c., Soc. *v.* Austin (46 Cal., 415, 488); which in turn is based on Dows *v.* Chicago (11 Wall., 110). The latter case distinctly holds that the prevention of a multiplicity of suits, or of irreparable injury, or of a "cloud" on title, will be sufficient ground for an injunction. Either of the grounds named will warrant the injunction. It is to be noted, also, that in Dean *v.* Davis, which is the only one of the cases mentioned relating to an assessment for a local improvement, the point now under consideration was not necessary to the decision, and may be therefore re-

garded as *dictum*. We insist also both upon the authorities, and upon principle, that as a sale, even under a void statute, does *in fact impair* the market value of property and prevent its sale by the real owner, it does create such a "cloud," *in fact*, *whether* a technical "cloud" or not, as will warrant equitable relief.

Judge McKinstry's doctrine seems to be, in fact, that injunction is never the remedy against an assessment of this nature. He says, indeed, that whether the assessment is absolutely void, or only irregular and voidable, *certiorari*, and not injunction, is the proper remedy against it. The multitude of cases in the books in which injunction has been resorted to and allowed as the remedy against such assessments, both void and voidable, furnish a sufficient answer to this statement. A late instance of a resort to that remedy against an invalid assessment, in which the injunction was sustained in the very court in which Judge McKinstry is sitting, is Cohn *v.* Parcels (14 Pac. Rep., 26).

But we insist that the position that the plaintiffs mistook their remedy in this case was not maintainable if their complaint states facts sufficient to entitle them to any remedy whatever, because by the California statute all distinctions between forms of action are abolished, and there is "but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs" (Code Civ. Proc., Sec. 307).

How can it be maintained, under such a statute, that the plaintiff has not brought the proper form of action, if he has alleged facts entitling him to relief in any form?

If the position of Mr. Justice McKinstry is correct that, upon the facts set out in the plaintiffs' complaint, their remedy was *certiorari*, and not injunction, can that possibly be a reason for denying them any remedy whatever?

Whether they sued for a *certiorari*, or for an injunction, the form of their action, under the code, was required to be the same, and there was surely no ground for turning them out of court altogether because they prayed for the wrong relief.

And, furthermore, if the plaintiffs did mistake their remedy, and it was proper, on that ground, to dismiss their complaint, although it set out facts entitling them to some other remedy than that prayed, we insist that it was not proper to do so where, as in this case, there was no objection to the form of action, or to the remedy sought by demurrer, or otherwise, in the court below, but such objection was made use of for the first time in the supreme court after a full hearing on the merits.

3. Mr. Justice McKinstry further holds that independently of the question of the constitutionality of the statute, the plaintiffs are estopped from contesting the validity of this assessment by their laches and acquiescence while the improvement was in progress, and the learned counsel for the defendants in error, on page 17 of his brief, cites a number of cases which he says support that position. We have examined those cases with some care, and although we have not space to review them at length, we confidently assert that they do not support the contention that a property owner failing to object to a public improvement, made under an admittedly unconstitutional and void statute, which imposes upon him and others an assessment to pay for it, will be estopped, after the completion of the improvement, from serving out an injunction against the collection of the assessment, especially where the ground on which the statute is claimed to be unconstitutional is that it did not award the property owners "due process of law," and where the facts constituting the estoppel are not pleaded, proved, and found against him. Most of the

cases cited were not cases of injunction at all, some of them were not cases of assessments for public improvements, and very few of them involved any question of the constitutional validity of the statute authorizing the proceedings, and in those of them in which that question did arise the statute was held valid. Such authorities are entitled to no consideration upon the subject now under discussion. Unless a case holds that a property owner assessed for a public improvement, under a statute which is absolutely unconstitutional and void, is estopped from contesting the assessment, if he stands by and permits the improvement to be completed without objection, it does not answer the present purpose of the defendants in error. He requires authorities to establish the proposition that this case could have been decided upon the ground of estoppel, without touching the constitutional question at all. It avails him nothing to produce authorities holding a property owner estopped in such a case by permitting the improvement to go on if the statute is constitutional and the proceedings are not void, but only voidable. Such authorities do not obviate the necessity of deciding the Federal question.

We maintain that where the statute under which an improvement and assessment therefor are made is unconstitutional, and the assessment is not merely irregular but absolutely void, a property owner assessed is not estopped, by remaining passive while the work is in progress, from maintaining a suit for injunction after its completion against the collection of the assessment (1 High on Inj., sec. 550; Hopkins *v.* Greensburg, &c., Co., 40 Ind., 44; Budd *v.* Kraus, 79 *Id.*, 140; Scott *v.* Brackett, 89 *Id.*, 419; Langworthy *v.* Dubuque, 13 Iowa, 88; Starr *v.* Burlington, 45 *Id.*, 87, 90; State *v.* Brunswick, 38 N. J. L., 190; Bogert *v.* City, 27 N. J. Eq., 572; Provident Inst. *v.* Allen,

37 *Id.*, 38; Matter of Sherp, 56 N. Y., 257; Merritt *v.* Portchester, 71 *Id.*, 309; Boyle *v.* Brooklyn, *Id.*, 1; Cagwin *v.* Hancock, 84 *Id.*, 534; Tingue *v.* Portchester, 101 *Id.*, 294; Wright *v.* Thomas, 26 Ohio St., 346; Teegarden *v.* Davis, 36 *Id.*, 603; Smith *v.* Toledo, 24 *Id.*, 126; Tone *v.* Columbus, 39 *Id.*, 281; Johnson *v.* Milwaukee, 40 Wis., 315). See also other authorities in the petition for rehearing in this case under the head of "Estoppel by Acquiescence or Laches" (p. 112 *et seq.*) In one of the cases cited by the learned counsel for the defendants in error (New Haven *v.* Fair Haven, &c., R.R. Co., 38 Conn., 422, 429) the distinction between mere irregularities and radical defects which render such an assessment absolutely void, is noticed and enforced in discussing the question of estoppel to complain of such mere irregularities or radical defects by laches in failing to object to the proceedings sooner.

It is further to be noted that in all, or at least nearly all, the cases cited for the defendants in error on this point, the knowledge of the facts by the party to be estopped, and other elements essential to the estoppel, affirmatively appeared. Nothing of the kind appears here. The doctrine of estoppel *in pais* is wholly inapplicable because there is no pleading, proof, or finding of the facts essential to create the estoppel, as laid down by Judge McKinstry himself in Lux *v.* Haggin (69 Cal., 266), upon a careful review of earlier California cases, and other decisions.

That was an action for diversion of a water-course, and it was claimed that the plaintiffs were estopped by standing by without objection while the defendants were constructing their expensive works. Judge McKinstry said that "to constitute an estoppel *in pais*" the party claiming "the benefit of it must be destitute of knowledge of his own legal rights, and of the means of acquiring such

knowledge (Boggs *v.* Merced, &c., Co., 14 Cal., 279 ; Stockman *v.* Riverside, 64 *Id.*, 57 ; Morrill *v.* St. Anthony's Falls, 26 Minn., 229). * * * It must also be shown that the person sought to be estopped has made an admission, or done an act, *with the intention of influencing the conduct of another*, or that he had reason to believe could influence his conduct, inconsistent with the evidence he proposes to give, or the title he proposes to set up ; that the other party has acted upon or been influenced by such act or declaration ; that the party so influenced will be prejudiced by allowing the truth of the admission to be disproved (Brown *v.* Brown, 30 N. Y., 519 ; S. C. 86 ; Am. Dec., 406 ; Plumb *v.* Cattarangus, &c., Ins. Co., 18 N. Y., 392 ; S. C. 72 ; Am. Dec., 526). In the case before us, the fact relied on as proving the estoppel is that the plaintiffs had knowledge of the expensive canals and other works of defendant while they were in progress and did not object to them. The bare fact that ditches, &c., were constructed with the knowledge of the plaintiffs, though at great expense, without objection by plaintiffs, is not enough to constitute such an estoppel " (Stockman *v.* Riverside, 64 Cal., 57).

There is nothing in the pleadings or evidence to show that the plaintiffs knew the facts constituting the estoppel, or that the defendant and intervenors had not equal means of knowledge thereof with the plaintiffs, or that they were misled or influenced in any way by the plaintiffs' action, or inaction ; much less that the plaintiffs had any " intention of influencing the conduct " of the defendants or intervenors. The only claim of the plaintiffs' knowledge of any of the facts arises from the circumstance that they fail specifically to aver their ignorance of them. But the burden is on the party claiming the benefit of the estoppel to show the other party's knowledge, and his own want of knowledge or of means of knowledge. The party estopped

is not required in advance to aver his ignorance. But as a matter of fact the plaintiffs do, in effect, aver their ignorance of the material facts in this case, and the averment is not disproved. The whole foundation of their claim lies in the fact that they have not had such legal notice of the proceedings of which they complain, and such opportunity to be heard against them, as to constitute "due process of law."

We do not think it necessary to discuss further the questions involved in this case on the merits. They are of the first gravity and importance. Their character has been already indicated. This does not seem to be the time to present them further. They are elaborately argued in the petition for a hearing in the supreme court of the State, a copy of which is contained in the record on file, page 425, *et seq.*, although not printed by the defendants in error on this motion.

Respectfully submitted.

THOS. B. BISHOP AND
WM. M. STEWART,
Counsel for Plaintiffs in Error.

Office Supreme Court U. S.
FILED,
JAN 6 1891
JAMES H. McKENNEY

Supreme Court of the United States.

No. 144.

LENT

vs.

TILLSON.

THE DUPONT STREET WIDENING ACT.

PRINTED FOR THE USE OF THE COURT.

EVENING POST JOB PRINT, NEW YORK.

AN ACT TO AUTHORIZE THE WIDENING OF DUPONT STREET, IN THE CITY OF SAN FRANCISCO.

(Approved March 23, 1876.)

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Width of street.

SECTION 1. The width of the street known as Dupont street, in the City and County of San Francisco, shall, subject to the provisions of this Act, be increased, so that the said street shall be of the uniform width of seventy-four (74) feet, measuring westerly from the present easterly line thereof, from the northerly line of Market street to the southerly line of Filbert street, and the grades of such of the cross streets as intersect said street shall be adjusted by the Board of Supervisors so as to make them conform to the grade of the west line of Dupont, as said line is hereby established; and the grade of said west line shall be established by said Board of Supervisors, which is empowered to pass all necessary orders for this purpose; *provided*, that nothing in this act contained shall be construed to authorize any change of the grade of the east line of Dupont street, or of any part of Stockton street.

Supervisors to establish grade.

Assessment of costs.

SEC. 2. The value of the land taken for the widening of Dupont street, and the damages to improvements thereon, or adjacent thereto, injured thereby, and all expenses whatsoever incident to the widening of said street, shall be held to be the cost of widening said street, and shall be assessed upon the district hereinafter described as benefited by said widening, in the manner hereinafter provided.

District to be improved.

SEC. 3. The district benefited by said improvement, and upon which the cost of making the same shall be assessed, is hereby described and designated as follows:

First.—Beginning at a point on the south line of Filbert street, equidistant between Dupont and Kearny streets, and running thence southerly, parallel with the said easterly line of Dupont street, to the northerly line of Market street; thence westerly, on the northerly line of Market street, to Dupont street; thence northerly, on the easterly line of Dupont street, to the southerly line of Filbert street, and thence easterly, on the southerly line of Filbert street, to the point of beginning, excepting such portions thereof as are dedicated and used for the purpose of streets, alleys, or public squares.

Second.—Beginning on the southerly line of Filbert street, at a point equidistant between Stockton street and the westerly line of Dupont street, as it will be established when said street is widened, running thence southerly, parallel with said westerly line of Dupont street, as herein established, to the northerly line of Market street; thence easterly, on said line of Market street, to the said westerly line of Dupont street; thence northerly, on said westerly line of Dupont street, to Filbert street, and thence westerly, on Filbert street, to the point of beginning, except such portions as are dedicated and used for the purpose of streets, alleys, or public squares; *provided, however*, that in case the said street be not widened further north than Bush street, then the districts aforesaid to be benefited shall be bounded on the north by the southerly line of Bush street, and on the south by the northerly line of Market street.

Board of Commissioners to consist of Mayor, Auditor, and Surveyor.

SEC. 4. The Mayor of the City and County of San Francisco, the Auditor of said City and County, and the City and County Surveyor, and their successors in office, are hereby constituted a Board of Dupont Street Commissioners, and, as such, shall possess all the powers and perform all the duties prescribed in this act. They shall each

Compensation.

receive a compensation of two thousand dollars for their services. The said Board may also allow and pay such sums as may be necessary and reasonable for clerks,

draughtsmen, surveyor, attorneys and other incidental expenses. The Mayor shall be *ex-officio* president of said Board. The said Board shall adopt and procure an official seal, which may be used to verify their official acts. The said Board may issue certificates of indebtedness, under their official seal and the signature of the President, for preliminary and incidental expenses.

Secretary.

SEC. 5. Said Board shall employ a Secretary, and such attorneys, clerks, draughtsmen, searchers of records, and other assistants as they may deem necessary and proper, and shall allow them a reasonable compensation. They shall rent and furnish a suitable office for the transaction of its business, if one cannot be furnished in the City Hall; *provided*, that the rent of said office shall not exceed fifty dollars per month, and the cost of furnishing the same shall not exceed two hundred dollars; *and provided further*, that no allowance for rent or services shall be made for a longer period than one year.

Office.

Notice to property owners.

SEC. 6. As soon as convenient after the passage of the resolution referred to in the twenty-first section of this act, said Commissioners shall publish a notice for not less than ten days, in two of the daily papers printed in the City of San Francisco, informing property owners along the line of said street that the Board is organized, and inviting all persons interested in property sought to be taken, or which would be injured by said widening, to present to the Board maps and plans of their respective lots, and a written statement of the nature of their claim or interest in such lots. Said Commissioners may also procure abstracts of the title of any of the lots of land taken for said widening, or liable to be assessed therefor.

Commissioners to determine and report value of property, etc.

SEC. 7. The said Board of Commissioners, having prepared and adopted suitable maps, plans, and diagrams, shall proceed to ascertain and determine, and separately state and set down in a written report, to be signed by at least a majority of said Board, the description and actual

cash value of the several lots and subdivisions of land and buildings included in the land taken for the widening of said Dupont street, and the damage done to the property along the line of said street. In making said report, said Board shall severally specify and describe each lot and subdivision or piece of property taken or injured by the widening of said street, as far as the owners of the same have furnished an accurate description thereof, and shall set down against each lot, subdivision, or piece of property, the names of the owners, occupants, and claimants thereof, or of persons interested therein as lessees, incumbrancers, or otherwise, and the particulars of their interest, as far as they can be ascertained, and the amount of value or damage determined upon for the same respectively. If, in any case, said Board shall find that conflicting claims of title exist, or shall be in ignorance or doubt as to the ownership of any lot of land, or of any interest therein, it shall be set down as belonging to unknown owners. Said Board shall also proceed to ascertain and set down in a written report a description of the several subdivisions or lots of land included in the districts designated in section three of this Act, and opposite to such description shall set against each lot or subdivision the sum or amount in which, according to the judgment of the Board, the said lot has been or will be benefited by reason of the widening of said street, relatively to the benefits accruing to other lots of land within said designated districts. Said Board shall also set against each lot or subdivision as aforesaid, the names of the owners, lessees, and claimants thereof, so far as the same can be ascertained conveniently by said Board, and if not ascertained, shall set them down to unknown owners. Error, however, in the designation of the owner or owners of any lot taken or assessed shall not affect the validity of the assessment. The said Board shall also attach to said report suitable maps, plans, or diagrams, showing the property taken and assessed for said improvement, in lots and subdivisions, with the name of the owners, lessees, and claimants, as far as known to said Board. Such report, as soon as the same

When conflicting claims.

Lots, when benefited.

Report.

is completed, shall be left at the office of said Board daily, during ordinary business hours, for thirty days, for the free inspection of all parties interested, and notice that the same is so open for inspection for such time and such place shall be published by said Board daily, for twenty days, in two daily newspapers printed and published in said city and county.

Action of Board when objected to.

SEC. 8. Any person interested in any piece or parcel of land situated within the district defined and described in section three of this Act, or in any of the lands taken for said street, or in any improvements damaged by the opening of said street, feeling himself aggrieved by the action or determination of the said Board, as shown in said report, may, at any time within the thirty days mentioned section seven of this Act, apply by petition to the County Court of the City and County of San Francisco, setting forth his interest in the proceedings had before said Board, and his objections thereto, for an order on said Board requiring it to file with said Court the report of said Board, and such other documents or data as may be pertinent thereto, in the custody of said Board and used by it in preparing said report. Said Court is hereby authorized and empowered to hear said petition, and shall set the same down for a hearing within ten days from the date of the filing thereof; and the party filing said petition shall, on the day he files the same, serve a copy thereof on at least one of the members of the Board of Commissioners; and said Board may appear by counsel, or otherwise, before said Court, in response to said petition. Said Board may file a written answer to said petition with said Court. Testimony may be taken by said Court upon said hearing, and the process of the Court may be used to compel the attendance of witnesses, and the production of books, or papers, or maps in the custody of said Board, or otherwise. It shall be in the discretion of said Court, after hearing and considering said application, to allow said order or deny the same; and if granted, a copy thereof shall be served on said Board, and it shall proceed to obey the same.

Petition of aggrieved party.

Board to file answer.

When no petition.

according to the terms of the order to be prescribed by the Court. But in case no such petition shall be filed with said County Court within the time above limited for the filing thereof, the said report shall be presented by the said Board to the said County Court, with a petition to the Court, that the same be approved and confirmed by the Court. The Court shall have power to approve and confirm said report, of refer the same back to said Board, with directions to alter or modify the same in the particulars specified by the Court in the order referring the same back, and thereupon the said Board shall proceed to make the alterations and modifications specified in the order of said Court. The alterations and modifications aforesaid being made, the report shall be again submitted to the said Court, and if the Court, upon examination, shall find that the alterations and modifications have been made according to the directions contained in said order, the said Court shall approve and confirm the same by an order to be entered on its minutes; but if the said Board shall have neglected or failed to make the alterations and modifications set forth in the order of reference, the Court may again refer the report back to said Board, and so on until its original order of alteration and modification shall have been complied with by said Board, and the said Court shall then approve and confirm said report.

Court may approve alterations.

Commissioners to issue bonds.

SEC. 9. All the damages, costs, and expenses arising from, or incidental to, the widening of said street, being fixed and determined by the final confirmation of the report, as in this act provided, said Board shall cause to be prepared and issue bonds of the City and County of San Francisco, in such form as they may prescribe, in sums of not less than one thousand dollars each, for such an amount as shall be necessary to pay and discharge all said damages, costs, and expenses, as aforesaid. Said bonds shall be known and designated as the "Dupont Street Bonds;" shall be payable in twenty years from their date, unless sooner redeemed, as in this Act provided, and shall bear interest at seven per cent. per annum, payable semi-

annually at the office of the Treasurer of said city and county. Coupons for the interest shall be attached to each bond, so that they may be removed without injury or mutilation to the bond. Such coupons, consecutively numbered, shall be signed by the President of said Board, and the bonds shall be signed by all the members thereof, and the seal of the said city and county shall be affixed to each bond. The lithograph signature of the President may be affixed to the coupons. Coupons.

SEC. 10. Any person or persons to whom damages shall be awarded, according to the provisions of this Act, upon tendering to the said Board a satisfactory deed of conveyance to said city and county of the land for which said damages were so awarded, shall be entitled to have, and there shall be issued and delivered to him, bonds in an amount equal to the sum of the damages as awarded for the lands conveyed as aforesaid, together with the damages for the improvements thereon or affected thereby; and the bonds so issued and delivered shall be accepted, and shall be in full compensation of, and for all damages for lands and improvements taken and improvements injured, as contemplated in this Act. Bonds to be given in payment for lands and damages.

SEC. 11. In case any person or persons entitled thereto shall, for the period of ten days after the final confirmation of said report, as herein provided, fail or neglect to accept bonds in compensation for damages allowed for lands taken, or improvements destroyed or injured, as provided in the last preceding section, the Mayor, Auditor, and Treasurer of said city and county shall advertise for the period of sixty days for sealed proposals for bonds, by notice published daily, Sundays and legal holidays excepted, in three daily newspapers published in the City and County of San Francisco. Said notice shall embody a succinct description of the bonds, and specify the rate of interest, when and where the same will be paid, and describe the manner in which bids therefor must be made. When owners fail to accept bonds.

Commissioners to advertise for bids for sale of bonds.

All bids shall be accompained by a bond on the part of the bidder, with one or more sureties satisfactory to said Mayor, Auditor, and Treasurer, conditioned that if an award is made by the Board, the terms of the bid will be complied with by the bidder. Proposals unaccompanied by a bond, as aforesaid, shall not be considered. Said Mayor, Auditor, and Treasurer may prescribe the form of the bid and of the bonds, and shall furnish the same to such persons as desire to make proposals for bonds. The said proposals shall be opened in the presence of the Mayor, Auditor, and Treasurer of said city and county, at the expiration of sixty days from the first publication of the notice aforesaid, and the bonds shall be awarded to the highest bidder therefor, whose proposals conform to the requirements hereof; *prrvided*, that none of said bonds shall be awarded at a less price than ninety-five cents on the dollar; *and further provided*, that the Board may reject any or all proposals, and readvertise. Any person to whom damages have been awarded by said Board of Commissioners, may bid for bonds to the extent of the sum awarded to him, or for any lesser sum, specifying in his proposal that he will accept bonds at the price stated in his bid, in compensation for the damages so awarded in his favor; and such bids being equally as advantageous as the best cash bids, shall be accepted in preference to cash bids. If the party shall not bid for such an amount of bonds as shall equal the amount of damages awarded, the Board shall deliver to him a warrant upon the "Dupont Street Fund," as hereinafter provided; and upon receiving the bonds and warrants as aforesaid, and the warrants being paid, the party shall file with the said Board an acquittance in full for all damages so awarded to him as aforesaid. Bidders of the class mentioned in this section shall be entitled to receive the bonds awarded to them as aforesaid, upon delivering to the said Board possession of the property in respect to which the award was made, and such conveyance thereof as shall be approved by the said Board. The said Mayor, Auditor, and Treasurer are authorized and empowered to sell and dis-

Opening of proposals.

Awards for damages to be preferred bids for bonds.

pose of bonds sufficient to realize money enough to meet and discharge all the expenses and damages arising from the widening of said street, as in this Act provided, and as established by the report as finally confirmed. The money arising from the sale of said bonds shall be paid to the Treasurer of said city and county, who shall receive and safely keep the same as moneys belonging to said city and county are kept; and said fund shall be known and designated as the "Dupont Street Fund." As soon as said bonds shall have been converted into money, as in this Act provided, the Board of Commissioners shall give public notice in two daily newspapers, published in said city and county, for at least ten days, that they are prepared to pay in full all damages and liabilities fixed by the final report of said Board (and not already discharged); and upon receiving from the parties entitled thereto the proper deeds or proper acquittances from those entitled to compensation, the said Board shall give to such party an order upon the treasury for the amount shown to be due, according to said finally approved report, and the Treasurer shall pay said order out of said "Dupont Street Fund."

Proceeds of sales.

SEC. 12. At any time within thirty days after the last publication of the notice specified in section six of this Act, a majority in value, according to the assessment roll for the present fiscal year, of the property owners fronting on Dupont street, between Market and Bush streets, may protest in writing against the widening of Dupont street, between said streets; and if such written protest, signed by such majority, is filed with said Board of Commissioners within said period, all the lots of land and property between Market and Bush streets shall be entirely exempt and excluded from the operation and from all the provisions of this Act, and shall not be affected by the same in any respect whatever; and such written protest shall have the effect to exclude and exempt the property between Market and Bush streets from the operation and effect of this Act; and at any time within thirty days after the

Protests against widening.

last publication of the notice specified in section six of this Act, a majority in value, according to the assessment roll for the present fiscal year, of the property owners fronting on Dupont street, between Bush street and Filbert street, may petition in writing (against) the widening of Dupont street, between said streets; and if such written petition, signed by such majority, is not filed with said Board of Commissioners within said period, all the lots of land and property between Bush street and Filbert street shall be entirely exempt and excluded from the operation and from all the provisions of this Act, and shall not be affected by the same in any respect whatever; and the failure to file such petition with said Board within said period shall have the effect to exclude and exempt the property between Bush street and Filbert street from the operation and effect of this Act; and for the purposes of the protests and petition mentioned in this section, the signature of the duly authorized agent, or the trustee or guardian of the owner, or the executor or administrator of the estate of such owner, shall have the force and effect of the signature of the owner, but the word "owner" shall not be construed to include lessees.

Interest Fund.

SEC. 13. There shall be levied, assessed, and collected annually, at the time and in the same manner as other taxes are levied, assessed, and collected in said city and county, a tax upon the lands described in section three of this Act, sufficient to pay the interest on said bonds as the same matures; said tax to be collected out of the said land only. The assessment therefore, however, shall be adjusted and distributed according to the enhanced values of the respective parcels of land, as fixed in the said final report by the said Board. When collected, the said moneys shall be paid over to the Treasurer of the said city and county, and constitute a part of the "Dupont Street Fund," and to be paid out by said Treasurer only in payment of the coupons attached to said bonds, as the same from time to time become due. There shall be levied, assessed, and collected annually, at the time,

and in the manner, and upon the same lands, and in accordance with the same rule of assessment upon enhanced values as provided in this section, a tax upon each one hundred dollars' valuation, sufficient to raise one-twentieth of the principal of said bonds, which shall constitute a sinking fund for the redemption of said bonds. Said moneys, when collected, shall be paid over to the Treasurer of said city and county, and shall constitute a part of the "Dupont Street Fund," and shall only be paid out in redeeming the bonds issued in pursuance of the provisions of this Act. Whenever the said Treasurer shall have in his custody ten thousand dollars or more, belonging to the said "Dupont Street Fund," as a sinking fund, it is hereby made his duty, and he shall advertise daily for the surrender of said bonds, for the space of ten days, Sundays and legal holidays excepted, in three daily newspapers published in the City and County of San Francisco, for sealed proposals, to be opened after the expiration of ten days, by said Treasurer, in the presence of the Mayor and the bidders, if they or any of them shall elect to be present, for the surrender of bonds issued under this Act, which advertisement shall state the amount of money in the custody of the said Treasurer for the purpose of redemption, and he shall accept the lowest proposals, at rates not exceeding par value, as may redeem the greater amount of bonds, until the amount of cash on hand for the redemption is exhausted; *provided, however*, that if a sufficient amount of bonds shall not be offered as aforesaid to exhaust the sinking fund to a less amount than three thousand dollars, then it is hereby made the duty of the said Treasurer to advertise in two daily newspapers, one of which shall be published in the City and County of San Francisco, and the other of which shall be published at the City of Sacramento, for the period of sixty days, Sundays and legal holidays excepted, which advertisement shall state the amount in the sinking fund, and the number of bonds, numbering them in the order of their issuance, which such fund is set apart to pay and discharge; and if said bonds, so numbered in such advertisement, shall not be presented

Sinking Fund provided for.

Notice of redemption.

for payment and cancellation within thirty days after the expiration of the publication of said advertisement, then said fund shall remain in the treasury to discharge such bonds whenever presented; but they shall draw no interest after publication of said last-mentioned notice shall have expired. All bonds and coupons redeemed as aforesaid shall be cancelled by the Treasurer in the presence of the Mayor and Auditor. The Treasurer shall keep a full and accurate account and record of all his proceedings under this Act, and of the bonds redeemed and surrendered, and all books and papers pertaining to matters provided for in this Act shall at all times, during office hours, be open to public inspection. Taxes levied to pay the interest on said bonds may be paid by the surrender to the Tax Collector of said city and county of such coupons as shall mature within the then current fiscal year, and the said Tax Collector shall turn the same over to the Treasurer, who shall receive the same as cash.

Record of proceedings.

Coupons may discharge taxes.

Block books must show.

SEC. 14. The said Board of Commissioners shall cause block books to be prepared, exhibiting the district declared herein to be benefited by the opening of said street, according to the blocks or fractional parts of blocks thereof, and the subdivisions, according to which the benefits were fixed and determined; also, in convenient book form, descriptions of the several subdivisions shown on said block books, and shall set opposite to each description of such several subdivisions the amount of benefits or enhanced value to said subdivision as established by said confirmed report, by reason of the opening of said street. Said block books and description note books shall be certified by the said Board, and then delivered by the said Board to the Assessor of the City and County of San Francisco, in whose office they shall be kept as a part of the records of his office until all the bonds issued in pursuance of this Act shall have been redeemed. Taxes levied to pay the interest and principal of the bonds issued in pursuance of the provisions of this Act shall be appor-

tioned on the lands described in section three of this Act, in strict accordance with the enhanced values of the respective parcels thereof, as established by said confirmed report; *provided, however*, that if there shall be subdivisions made of particular parcels of land differing from those set forth in the certified copy filed in said Assessor's office, the said Assessor shall have the power, and it is hereby made his duty, to equitably apportion the sum of the benefits upon and according to the new subdivisions of the said particular parcel aforesaid.

When conflicting claims, title shall vest.

SEC. 15. In all cases when the owner or owners of any subdivision of land taken for the widening of said street, or of any improvements destroyed or injured, is or are unknown, or is or are known to be laboring under any legal disability, and in cases where there are liens or incumbrances, or leases or conflicting claims, or disputes or doubts about the title of any lot or subdivision of land, which cannot be adjusted between the parties in interest, in all such cases it shall be the duty of the Board of Commissioners to draw a warrant on the Treasurer of said city and county, payable out of said "Dupont Street Fund," for the amount awarded in each case as the value of the respective lots of land taken for said street, or for damages awarded on account of improvements destroyed or injured by reason of the widening thereof, as fixed in said report, and to deposit said warrant with the County Clerk of said city and county; and thereupon, and on proof of the same, the said Board shall be entitled to be put in possession of such lots of land as shall be taken for said street, in the same manner as provided in section sixteen of this Act; and the title to said lots of land shall thenceforth be vested in said city and county as effectually as if the same had been conveyed by deed executed by the true owners thereof. Said Board shall also notify the said Treasurer of the drawing of said warrant, and furnish him with a description of the lot referred to by said warrant; and the parties in interest in said lot may proceed against the Treasurer by bill

in equity for an adjudication to settle the conflicting claims to the same, or to provide for its just and proper distribution, in which suit all parties in interest or dispute shall be made parties, if known. On entry of a final decree of court in such action the said County Clerk shall deliver the warrant to the party or parties entitled thereto, according to the order of the Court. The only requisition upon the Treasurer shall be to answer whether he has the money in the "Dupont Street Fund" to pay the warrant when presented.

Failure to accept payment.

SEC. 16. In case any person to whom, or in whose favor, damages shall have been awarded by said Board, shall fail or neglect, for the period of twenty days after there shall be funds to the credit of the "Dupont Street Fund" sufficient to pay such damages, to ask for and receive from said Board a warrant for the sum so awarded, the said Board may draw a warrant upon said Treasurer in favor of said owner or owners, and deposit the same with the Clerk of said city and county, accompanied by a certificate of said Treasurer that the warrant so drawn and deposited has been registered by him, and that there are funds in his hands to pay the same; and thereupon said Board, on demand, shall be entitled to an order of the County Court, authorizing them to enter upon such piece of land and remove obstructions therefrom, and to throw open the lots so described as part of said street; and thereupon an execution may issue to the Sheriff of said city and county, commanding him to put the said Board in possession of such lot for the said city and county; and thereafter, upon delivering to the said County Court a sufficient deed conveying said lot of land to the said city and county, the party so dispossessed shall be entitled to receive the value of the land so conveyed, or the said warrant of the Board therefor.

Court may deed property to city.

Removal of buildings, etc.

SEC. 17. Should the owners of any land taken for said street fail or neglect, within the space of thirty days after the money is in the treasury to pay the same, to remove

the buildings and improvements from their said lands, and deliver possession of said lands to said Board, on tender from said Board to them respectively of the sums awarded to them respectively by said Board as the value of such lands, buildings, or improvements, then the said Board may, at any time thereafter, sell such buildings and improvements at public auction to the highest bidders, to be removed by the respective purchasers thereof. The sums so bid at such sales shall be paid in cash or in such warrants of said Board; and if at such auction there shall be no responsible bidder for such improvements, with the obligation to remove them within the time specified in the terms of sale, said Board shall cause the same to be removed at the cost of said "Dupont Street Fund."

City to grade, sewer, etc.

SEC. 18. The said street, when widened, shall, without delay, be sewered, graded, sidewalked, and paved by the municipal authorities, in accordance with the provisions of law now or hereafter applicable thereto, and the expense of such work shall be assessed upon the adjacent property, or be borne by the city and county, in the same manner as if the said street remained of its original width.

Railroad track.

SEC. 19. The railway track in said street shall be removed and changed to the centre of the same by the street railroad companies now using tracks therein.

SEC. 20. The word persons, when used in this Act, shall be held and construed to include corporations. All bonds and warrants shall be payable, and all taxes shall be collected, in United States gold coin.

Supervisors may order street widened.

SEC. 21. The Board of Supervisors of the City and County of San Francisco are hereby authorized, if, in the judgment of said Board, it should be expedient that Dupont street be widened in accordance with and in the mode prescribed by this Act, to express such judgment by resolution or order in such form as they may deem advisable, within sixty days after the passage of this Act, and in the event

that said Board of Supervisors, within said period of sixt days after the passage of this Act, should fail to pass a order or adopt a resolution declaring it expedient to wide Dupont street under the provisions of this Act, no furthe proceeding shall be had or taken under this Act for any purpose whatever, and said street shall remain of its present width; but if said Board pass such resolution, then all proceedings thereafter shall be taken under the provisions of this Act.

Completion of work to be deemed acceptance.

SEC. 22. The completion of the work described in this Act shall be deemed an absolute acceptance by the owners of all lands affected by this act, and by their successors in interest, of the lien created by this Act, upon the several lots so affected, and it shall operate as an absolute waiver of all claim in the future upon the City and County of San Francisco for any part of the debt created by the bonds authorized to be issued by this Act, and their successors in interest. This shall be regarded as a contract between said owners and the holders of said bonds and said city and county, and this provision shall be stated on the face of the bonds.

SEC. 23. This Act shall take effect from and after its passage.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 144.

W. M. LENT, ET ALS.,

Plaintiffs in Error,

vs.

CHARLES TILLSON, TAX COLLECTOR OF THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant in Error.

In Error to the Supreme Court of the State of California.

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN GARBER,
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Evening Post Job Print, New York.

that said Board of Supervisors, within said period of sixt days after the passage of this Act, should fail to pass a order or adopt a resolution declaring it expedient to wide Dupont street under the provisions of this Act, no furthe proceeding shall be had or taken under this Act for any purpose whatever, and said street shall remain of its pres ent width; but if said Board pass such resolution, then all proceedings thereafter shall be taken under the provisions of this Act.

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Plaintiffs in Error,

vs.

CHARLES TILLSON, Tax Collector of the City and County of San Francisco,
Defendant in Error,

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

1. This is a writ of error brought to reverse a judgment of the Supreme Court of the State of California, rendered on an appeal from the Superior Court of the City and County of San Francisco. The plaintiffs in error, as plaintiffs, commenced an action against the Tax Collector of said City and County, as defendant, to enjoin the latter from selling certain real property of the plaintiffs to collect an installment of an assessment for benefits imposed upon said property and upon other property under an act of the Legislature of California, entitled "An Act to authorize the widening of "Dupont street, in the City of San Francisco," approved March 23, 1876 [St. 1875-6, Ch. CCCXXVI], to pay certain bonds issued thereunder to cover the cost and expense of said improvements.

The plaintiffs pleaded the act upon which the assessment was based as a part of their complaint (Record, p. 3), and

besides asking for a perpetual injunction sought a decree adjudging the assessments to be "fraudulent, excessive, illegal and void" and a cloud upon their titles (Record, p. 16).

Certain of the bondholders filed in the case a complaint in intervention against the plaintiffs in the action, tendering substantially the same issues involved in the controversy between the plaintiffs and defendant. This complaint in intervention the plaintiffs answered. The litigation then presented a double aspect, and, in fact, from that time became two cases in one. The one being the original suit between the plaintiffs and the defendant, and the other the suit of the intervenors against the plaintiffs. This intervention having been permitted and acquiesced in without objection, the right to intervene was no longer open to contestation (Donner *vs.* Palmer, 51 Cal., 629; McKenty *vs.* Gladwin, 10 *Id.*, 227; Smith *vs.* Penry, 44 *Id.*, 161), and the dismissal of the plaintiffs' complaint even would not dismiss the intervention (Poehlman *vs.* Kennedy, 48 Cal., 201). The issues tendered by the intervention by which the bondholders seeking to obtain a conclusive adjudication that the assessment was a valid lien upon the assessed property, invited the property owners into a contest as to the validity of the assessment as between themselves, having been accepted by the property owners, the question of remedy no longer cut any figure in the case, and the very rights of the parties having been by common consent put in issue, tried and determined, no one could thereafter raise any question as to the legal propriety of that procedure. This the cases above cited conclusively show.

The trial Court after finding substantially in favor of the plaintiffs upon the common issues involved in both the plaintiff's complaint and the complaint in intervention; that the intervenors were not *bona fide* holders of these bonds, and that they took them with notice that they were invalid, unauthorized and void (Record, p. 140), further found that the said act of the Legislature (the Dupont

Street Act,) was unconstitutional and void, that the action of the Board of Commissioners, who made the assessment, was unauthorized and void, and that the proceedings of the County Court in confirming the assessment were entirely wanting in jurisdiction (p. 141, fol. 423), and awarded a perpetual injunction.

A motion for a new trial having been made and denied by the Superior Court, the defendant and intervenors, now defendants in error appealed from the judgment and from the order denying the motion for a new trial, to the Supreme Court of said State (*Id.*, pp. 150–330).

The State Supreme Court reversed the judgment of the Superior Court and ordered the case remanded to that Court with directions to dissolve the injunction and to dismiss, for reasons, stated in the opinion (Record, pp. 332–357). The judgment of reversal goes only to the judgment of the Superior Court, and says nothing of the order denying the motion for a new trial. It necessarily proceeds upon the assumption that the facts are correctly stated in the findings of the Superior Court. The grounds of the judgment of the State Supreme Court are, in substance:

1. That the said act provides for "due process of law" to those assessed, with respect to the assessment, and is constitutional. 2. That due "process of law" was in fact accorded to those assessed. The plaintiffs in error, within twenty days after the rendition of the judgment of the State Supreme Court filed a petition in said Court for a rehearing. This petition was denied by the Court and the judgment by virtue of the laws of the State became final in that Court thirty days after its rendition.

To reverse this judgment of the State Supreme Court the present writ of error is brought. The errors complained of are all fully and particularly set forth in the specifications of error given below. The questions involved in the case, as indicated in said specifications, all arise upon the Act of March 23d above mentioned, and upon the facts admitted in the pleadings and stated in the

findings of said Superior Court, which must be taken as conclusive here.

The act has been printed in full for the convenience of the Court, and copies of it are filed with this brief.

A statement, however, of some of its provisions is necessary to an understanding of the facts.

2. The Dupont Street Act.

Sec. 1. Subject to the provisions of this act the width of Dupont street (originally 44 feet) shall be increased so that the same shall be of the uniform width of 74 feet, measuring westerly from the present easterly line thereof from Market street to Filbert street.

"Sec. 2. The value of the land taken for the widening "of Dupont street, and the damages to improvements "thereon, or adjacent thereto, injured thereby, and all "expenses whatsoever incident to the widening of said "street, shall be held to be the cost of widening said "street, and shall be assessed upon the district herein- "after described as benefited by said widening, in the "manner hereinafter provided.

"Sec. 3. The district benefited by said improvement, "and upon which the cost of making the same shall be "assessed, is hereby described and designated as follows:"

Here follows a description of two strips of land, one on either side of Dupont street, extending from Market street to Filbert street—the strip on the east side extending half way to Kearney street, and that on the west side half way to Stockton street, such streets being the parallel streets nearest to Dupont street on the east and west. These streets contain a great number of lots fronting on the streets crossing Dupont street, and not fronting on Dupont street. Many of the owners of such lots are among the plaintiffs. Indeed all the plaintiffs are property owners, either on the east side of Dupont street or on the cross streets running into it, each owning separate lots.

To these descriptions was added the following proviso:

"*Provided, however*, that in case the said street be not "widened further north than Bush Street, then the dis- "tricts aforesaid to be benefited shall be bounded on the "north by the southerly line of Bush Street, and on the "south by the northerly line of Market Street."

(As a matter of fact the street was not widened farther north than Bush street, four blocks in all.)

"SEC. 4. The Mayor of the City and County of San "Francisco, the Auditor of said city and county, and "the City and County Surveyor, and their successors in "office, are hereby constituted a Board of Dupont Street "Commissioners, and, as such, shall possess all the powers "and perform all the duties prescribed in this Act. They "shall each receive a compensation of two thousand dol- "lars for their services. The said Board may also allow "and pay such sums as may be necessary and reasonable "for clerks, draughtsmen, surveyor, attorneys, and other "incidental expenses. The Mayor shall be *ex-officio* "president of said Board. The said Board shall adopt "and procure an official seal, which may be used to verify "their official acts. The said Board may issue certificates "of indebtedness, under their official seal and the signa- "ture of the President, for preliminary and incidental ex- "penses."

(The Mayor was A. J. Bryant; he was a property owner on Dupont street, between Market and Bush streets, and one of the parties interested. The act made no provision for his removal, or for the substitution of any one in his place, and he in fact acted as commissioner.)

"SEC. 21. The Board of Supervisors of the City and "County of San Francisco are hereby authorized, if, in "the judgment of said Board, it should be expedient that "Dupont Street be widened in accordance with and in the "mode prescribed by this Act, to express such judgment "by resolution or order in such form as they may deem "advisable, within sixty days after the passage of this "Act, and in the event that said Board of Supervisors,

" within said period of sixty days after the passage of this " Act, should fail to pass an order or adopt a resolution " declaring it expedient to widen Dupont Street under the " provisions of this Act, no further proceeding shall be " had or taken under this Act for any purpose whatever, " and said street shall remain of its present width; but if " said Board pass such resolution, THEN ALL PROCEEDINGS " *thereafter shall be taken under the provisions of this Act.*

" SEC. 5. Said board shall employ a Secretary, and such " attorneys, clerks, draughtsmen, searchers of records, and " other assistants as they may deem necessary and proper, " and shall allow them a reasonable compensation." Then after providing for the renting of an office for the board and the amount of rent to be paid it is added: " and *pro-* " *vided further*, that no allowance for rent or services " shall be made for a longer period than one year.

"SEC. 6. As soon as convenient after the passage of the " resolution referred in the twenty-first section of this Act " said Commissioners shall publish a notice for not less " than ten days, in two of the daily papers printed in the " City of San Francisco, *informing property owners along* " *the line of said street that the Board is organized and* " *inviting all persons interested in property sought to be* " *taken, or which would be injured by said widening, to* " *present to the Board maps and plans of their respective* " *lots, and a written statement of the nature of their claim* " *or interest in such lots.* Said Commissioners may also " procure abstracts of the title of any of the lots of land " taken for said widening, or liable to be assessed there- " for."

(This is the only provision either for notice or hearing before the Board of Commissioners.)

SEC. 7. Provides for the making by the board of the assessment of damages and benefits and for a written report of their work, and concludes as follows:

" Such report, as soon as the same is completed, shall " be left at the office of said Board daily, during ordi- " nary business hours, for thirty days' for the free " inspection of all parties interested, *and notice that the* " *same is so open for inspection for such time and such* " *place shall be published by said Board daily, for twenty*

" days, in two daily newspapers printed and published in " said city and county.

SEC. 8. Provides for a very limited hearing only in the County Court. It will be found quoted on page 83 of this brief, where its provisions are discussed.

SEC. 9. Provides for the issuance of bonds of the City and County of San Francisco to pay the cost of the improvement.

SEC. 12. Allows a majority the property owners fronting on Dupont street, between Market and Bush streets, to defeat the improvements between those streets and to relieve that portion of the assessment district from any burden on account of it by filing a written protest at any time within thirty days after the notice prescribed in Sec. 6 (no such protest was filed); and further provides that unless within a similar time a majority of property owners fronting on Dupont street, between Bush and Filbert streets shall petition for it, there shall be no widening north of Bush street, and that portion of the assessment district shall be excluded (no such petition was filed, and the widening was limited to the four blocks between market and Bush streets).

SEC. 13. Provides for the levy and assessment of annual taxes, for 20 years, to pay the principal and interest of the bonds—to be assessed only upon the lands in the assessment district.

3. *The history of the widening of Dupont street and of the assessment therefor, under the foregoing statute, as disclosed by the pleadings and findings, and explained by the evidence, is as follows:*

Dupont street is one of the oldest streets in the City of San Francisco. It was originally only forty-four feet wide, and so remained until the action had under this act. Indeed, except for the short section of the street extending

from Market street to Bush street, a distance of only four blocks of 412½ feet each, it is still of the original width, the majority of the property owners along the street from Bush to Filbert street having neglected to avail themselves of the privilege conferred upon them by Section 12 of the act, of petitioning for the widening that portion of the street (Record, p. 3). On March 27th, four days after the approval of the act, a resolution declaring the expediency of the widening of Dupont street, as provided in Section 21 of the act, was hurried through the Board of Supervisors.

Under this resolution, however, the officers designated by Section 4 of the act to constitute the "Board of Dupont Street Commissioners," at successive meetings held on April 3, 10 and 12, 1876, organized as such board, elected a president, secretary, and attorney, employed a searcher of records to make abstracts of title to land taken for the improvement, ordered certificates of indebtedness to be issued for certain preliminary expenses already incurred, and passed a resolution authorizing the publication of the notice of organization, &c., provided for in section six of the act, in three daily newspapers named in the resolution, and in a form therein prescribed (Record, pp. 114, 116, 142, 143). The Court below found that publication of this notice was not properly made (*Id.*, pp. 114, 115, 142, 143).

The Board nevertheless immediately set about carrying out the enterprise provided for in the act. But it did not even attempt to make the assessment of damages and benefits itself as the act contemplated. On June 7, 1876, it selected six experts to "assist" it in estimating the damages for property taken and injured by the proposed improvement and the benefits accruing therefrom, three of the experts to estimate the damages and benefits as to the land, and the other three to estimate the value of improvements, although there was nothing in the act to authorize the appointment of such experts (Rec., pp. 118, 119). Afterwards, and before the experts began their labors, the board adopted a resolution instructing them as to their duties, and especially requiring them *to make their appraisements, as far as practicable,*

without the suggestion or knowledge of the owners of the property affected, or of any other person (*Id.*, p. 119). Acting under these instructions and injunctions of secrecy, the experts proceeded, not to "assist" the Board in making, but to make, the necessary appraisements without any help from the board. Having completed their labors they submitted to the commissioners written reports, giving separately their appraisements of the damages to each lot and subdivision of land taken or injured by the widening of the street, and to the buildings and improvements thereon, and their assessment of the benefits to each lot and subdivision in the district described in Section 3 of the act, between the northerly line of Market street and the southerly line of Bush street (*Id.*, pp. 113, 120).

The commissioners, after the reports of the experts had been submitted, held a meeting, at which they *accepted those reports as being entirely correct, and adopted as their own* without any change whatever, *the estimates, valuations, appraisement and assessment made by the experts,* as therein contained. *They expressly awarded as damages, and assessed as "benefits," the amounts of damages and "benefits" awarded and assessed by the experts to and against the property owners interested.* And they directed their secretary to *transcribe into their official report, from the reports of the experts, the amounts so awarded and assessed* (Rec., pp. 120, 145.) The secretary, in obedience to these instructions, transcribed *and set down in the official report of the commissioners, opposite to each lot, subdivision, building, &c., affected by the improvement, the amount of damages awarded to it, or of "benefits" assessed against it, in the reports of the experts* (*Id.*, pp. 120, 128).

The so-called report of the commissioners was thus, in substance, simply a copy of the reports of the experts. The commissioners themselves never made, or attempted to make, any appraisement of damages or assessment of "benefits" under this Dupont street act. Nor did they investigate the appraisement and assessment made by the

experts, or attempt to ascertain whether or not they were correct, fair and just before adopting them. In their resolution of adoption they did not profess to have made any such investigation, or even formally recite the correctness, fairness or justice of the awards and estimates made by the experts (*Id.*, p. 145).

The appraisement and assessment thus made by the experts, and adopted by the commissioners, were not in fact correct, or fair or just, nor has it ever been claimed that they were; on the contrary, they were grossly fraudulent --a stupendous job. The land appropriated, as appears from the act, was a strip thirty feet wide taken from the front of the lots fronting on the street. In estimating the value of the land so taken from each lot, the experts treated each part so taken as *a front lot only thirty feet deep*, appraising the value of its frontage as the actual damage incurred by the owner, without regard to the fact that the part left would still be a front lot, and that the value of the frontage, instead of being taken away, would be greatly enhanced by the increased width of the street. In this way the experts estimated the land so appropriated at more than *two hundred per cent. beyond its real value.* On the other hand, the experts adopted a rule for ascertaining the "benefits" which was also false, and not uniform or equal or just to property owners on the east side of the street, including the plaintiffs in error. The district, designated in the act as "benefited" by the improvements, included lands on both sides of the street. But they were not equally benefited, because, while the lots on the east side being front lots before the widening of the street, were benefited thereby only in the improvement of the value of their existing frontage, the lots on the west side, left after the appropriation of the thirty-foot strip, having previously been rear lots, acquired the entire value of their subsequent frontage by reason of their widening. The experts, however, unjustly and unfairly applied the same rule in estimating the "benefits" to lots on both sides of the street. They treated the lots on the west side, not as

having acquired a frontage, by the widening, but as already front lots deriving no more benefit from the widening than the lots on the east side which had always been front lots. They thus *omitted from their estimate of "benefits" two lots on the west side about two-thirds of the real "benefits,"* thereby unjustly and unfairly increasing to that extent the burden of the assessment upon the lots on the east side of the street (Record, pp. 128, 129). The commissioners, by adopting the appraisement and assessment made by the experts, approved and ratified this inequality and injustice. And they did this with full knowledge of the facts. They were informed of those facts, and had the injustice and inequality of the rules of appraisement and assessment adopted by the experts fully explained to them before they submitted their report for confirmation (*Id.*, pp. 134–136, 145, 146, 191, 193). It was to perpetuate these frauds that the subsequent frauds upon the Court and the parties were committed.

The report of the commissioners thus copied from the reports of the experts did not, as required by Section 7 of the act, give the names of the "owners, lessees or occupants, and claimants" of the several lots and subdivisions of land taken or damaged by the improvement, or assessed to pay for it, but, in every instance set down the property as belonging to "unknown owners on the assessors' books assessed to ," giving the name of the person to whom it was assessed (Rec., pp. 125, 128).

Before filing the report for "inspection" as provided in Section 7 of the act, the commissioners proceeded to add to the damages awarded by the experts certain items for expense, &c., to make up the aggregate cost of the improvement. They had already fixed the salaries of their attorney and secretary at $250 and $200 per month respectively, and had provided that those salaries should terminate at the end of a year, but that the attorney and secretary should continue thereafter to perform all services required of them without compensation (Rec., p. 118). Now, however, they allowed the attorney, in addition to his salary, $3,200 "for examining titles."

They allowed the experts $14,215.25 in the aggregate, for their services for less than two months. Then, after allowing $6,000 for their own services, and providing for in full for all other costs and expenses which could properly accrue from the proposed improvement, they arbitrarily added thereto, by an exercise of prophetic imagination, the further sum of $98,935.71, under the head of "estimated incidental expenses to accrue up to "and until the close of the duties of the board, advertis- "ing, removing, improvements, expenses, of any litiga- "tion that may arise, drawing deeds, damages, if any, "from change of grade, and any other item of damage "and expense that may be incurred and not set forth in "this report" (*Id.*, pp. 118, 129). By this means, the cost, damages and expenses incident to the improvement were fictitiously swelled to an aggregate sufficient to absorb even the exaggerated "benefits" reported by the experts, the sum of the "benefits" and the sum of the cost, damages, &c., appearing in the completed report to be exactly equal, each amounting to $898,105.

The plaintiffs in error and others assessed to pay for this improvement had no notice of, or opportunity to be heard against, any of these proceedings of the experts or commissioners. There is no claim or pretense that there was any such notice or opportunity for a hearing. On the contrary, the whole matter was purposely concealed from those interested until the completion of the report, as is shown by the injunction of secrecy imposed upon the experts.

Some of the members of the Board of Experts, who really made the appraisement and assessment, were, and one of the Board of Commissioners who adopted them was, personally interested in the matter, and were thus "judges in their "own cause" and incapable in law of giving a fair hearing upon it. Bryant, the Mayor of the City, who was a member and president of the Board of Commissioners, was at the time of the passage of the act, and during all the proceedings respecting the making and confirmation of the assessment, the owner of a part of the assessed

property (Rec., pp. 11, 48, 74). And one of the three experts who made the awards of damages for property taken for the improvement, purchased for the sum of $75,000 one of the lots, a part of which was so taken, after the report of the experts thereon was completed, but while its contents were still silent and before it was submitted to the commissioners, one of the other experts acting as his broker, in making the purchase; and Bryant, one of the commissioners, signed a note jointly with the purchaser for $60,000 of the purchase money (*Id.*, pp. 137, 138).

After the report of the commissioners had been completed, it was, on September 23, 1876, filed in the office of the board for "inspection," and the commissioners, by resolution, authorized their secretary to publish notice of its completion, in two designated daily papers for twenty-one days. The trial Court found that this notice also was not properly published. (Rec., pp. 129, 130). The notice as published was dated September 23d, the first day of publication. It was not addressed or directed to any particular person or class of persons, but was a notice to "all the world," the language of it being: "Notice is here-"by given to all persons, that the report of the Board of "Dupont Street Commissioners * * * have been com-"pleted * * * and are open for free inspection," &c. The notice did not indicate the nature of the report or what property owners were affected by it, or that they had any rights or duties in regard to it (*Id.*, p. 282).

From October 5th to October 25th inclusive, numerous petitions of persons claiming to be "agrieved" by the report, were filed in the County Court under Section 8 of the act (Record, pp. 130, *et seq.*, 211–244). The petitioners presented various and numerous objections to the report. Some of them asked to have the damages awarded to them for property taken or injured increased beyond the amounts fixed by the experts, and adopted by the commissioners, while others sought to have the "benefits" assessed against their property reduced. The commissioners did not attempt to contest any of the petitions

or attempt to defend the correctness of the work of their experts. On the contrary, they sought only to placate the petitioners and to induce them to withdraw their objections to the report by conceding all that they demanded. For this purpose they entered into a secret arrangement with each of the petitioners, without notice to the plaintiffs in error or other owners of assessed property and without their knowledge or that of the County Court, whereby each petitioner agreed to withdraw his objections to the report, and the commissioners, in consideration of such withdrawal, through their attorney, agreed to increase the award of damages to the petitioner, or to lower his assessment, in accordance with his request. Pursuant to this secret arrangement, by consent of the petitioners respectively, and of the commissioners and their attorney, without notice to the plaintiffs in error or other property owners affected by the assessment, and without their knowledge, and in their absence, an order was made and entered by the Court as to each of the petitioners, in accordance with his agreement with the board directing the modification of the report as agreed on, and referring the report back to the commissioners to make the modification. By these secret arrangements and agreements, thus entered as orders of the Court, the aggregate amount of the damages awarded by the original report to all the petitioners was increased from $33,438 to $50,174, and the aggregate of the assessments against them was reduced from $277,276 to $177,369 (*Id.*, pp. 130–132.)

No answer to any of these petitions was ever filed or presented to the County Court by the commissioners or by any one else. No hearing was had or attempted to be had upon any of the petitions or upon the merits of any of the objections therein made against the report. No proof or testimony was taken or offered as to any of those objections. No investigation or inquiry was made or attempted respecting any of them. No discussion of any of them was had or offered. No explanation of any kind was presented or tendered to the Court concerning any of the petitions, or

objections, or concerning any of the modifications of the report which were requested, other than the bare statement that such modifications had been agreed upon by the counsel for the commissioners and for the petitioner or petitioners interested, and might, with the consent of such counsel, be ordered. In brief, the modifications and alterations of the report upon those petitions were all ordered by the Court solely because they had been agreed upon by the petitioners respectively, and by the commissioners without any hearing, or evidence, or argument, or inquiry, or investigation, or consideration of the merits of the petitions or of the objections therein contained. And those alterations and modifications were consented to by the commissioners solely to induce the petitioners to withdraw their objections to the report, and *to prevent any hearing of those objections or any examination or consideration of the report on its merits.* Nor was any disclosure made or offered to be made to the Court, of the circumstances in which the commissioners so consented to those alterations and modifications, or of the reasons or motives which induced them to consent thereto; and the Court thus acted merely as the *amanuensis* of the commissioners and the several petitioners in registering their private agreements, as its orders, without any knowledge or means of knowledge of the facts, or truth, or right of the case. And none of the plaintiffs in error, or of their predecessors in interest, ever, personally or by counsel conferred or consulted with any of the petitioners or their counsel concerning their objections to the report, or investigated the grounds of those objections, or had any opportunity of doing so. Nor did they, or any of them, or of their predecessors in interest, ever in any way or for any purpose consent or agree to any alterations or modifications made or ordered to be made in the original report of the commissioners (*Id.*, pp. 132, 133, 136, 137, 205, 206).

In making these alterations, modifications and changes a different mode of estimating values, damages and "benefits" was applied to the property of those thus objecting

to the report from that which was employed in dealing with the property of the plaintiffs in error and others, to the great injury of the latter. By this unjust and inexcusable discrimination all semblance of equality and uniformity in the original assessment was destroyed, and the burden imposed upon the property of the plaintiffs in error and others, who failed to file petitions objecting to to the report, was thereby unfairly increased upwards of one hundred thousand dollars (Rec., p. 133).

In the case of three of the petitioners thus objecting to the report, Thomas H. Blythe, James Phelan and David Hunter, the petitions were not even set down for hearing before the making of the order applied for as required by the act, but the order was made immediately. These three petitions were filed on October 20th, setting forth certain objections to the report, and praying for an order requiring the commmissioners to file their report in court with the accompanying documents and *data*. The Court, on the same day, made the order prayed for, and then set down the petitions for hearing on October 27th. On the day so set, the commissioners filed the report in Court with certain other documents and *data* without any hearing whatever upon the question whether or not the order prayed for, requiring it to be filed, should be granted, or upon any of the objections to the report contained in the petitions (Rec., pp. 133, 134). In none of the orders granted by the Court, requiring the filing of the report and other documents and *data*, was there any specification of the documents or *data* intended. In each case the order was in general terms, requiring the board to file its report in Court, together with "all such documents and "*data*, as may be pertinent thereto, which are in the cus- "tody of said board," &c., leaving the board to exercise its own discretion in determining what documents and *data* were thus "pertinent" (*Id.*, pp. 232, 233). The documents and *data* which were in fact filed with the report were only two general maps, plans and diagrams showing the property taken and assessed, one block book, one book of description, appraisement and improvements,

one book of lots, lands and buildings, and the record book of the board (*Id.*, p. 134). Thus the reports of the experts, which were the documents chiefly used in preparing the report, and other documents were omitted.

In Blythe's petition as well as in some of the others, one of the objections made to the report was, that the commissioners had adopted a wrong rule for estimating the value of property taken (Record, pp. 220–227). The commissioners having reached a point "where the opposition of Mr. "Blythe could not be overcome" in any other way, hit upon the plan of a private arbitration of the controversy (*Id.*, p. 189). In order to induce Blythe to withdraw his objections to the report, the commissioners through their attorney, privately agreed with him to submit to three arbitrators the question as to what amount of "benefits" could be fairly assessed against his property. Without any order of Court authorizing such a proceeding the arbitrators were selected, and it was agreed, between the commissioners and Blythe, that the arbitrators might examine and consider the whole subject of the damages and "benefits" to accrue from the improvement without regard to what had already been done in the matter, and that they should take, as a basis for estimating damages, the difference between the value of the lots on the west side of Dupont street, as they were before the widening of that street, and the value of the same lots reduced in depth thirty feet by reason of the widening; although the commissioners, through their attorney, insisted that this was not the correct or proper rule. The arbitrators made their estimates in accordance with the rule thus agreed upon, and ascertained and reported to the commissioners that the true value of the land appropriated for the improvement was $246,240, and not $639,913, as found by the commissioners, and that the true amount of "benefits" to be assessed against Blythe's property was $38,653, and not $97,308 as stated by the commissioners. And the commissioners, solely for the purpose of silencing Blythe's opposition to the report, consented to a change of the assessment against his property from $97,308, to the sum of

$39,653, so reported by the arbitrators, and it was so changed. None of the plaintiffs in error had any notice or information of this private arrangement with Blythe, or of the arbitration, or of any of the doings or proceedings of the arbitrators or commissioners respecting Blythe's assessment. Nor had any of them any opportunity whatever to contest any of these proceedings before the arbitrators, or before the commissioners, or before the County Court (Rec., pp. 134–136, 145, 146). And, as we have already seen, the Court itself, when making the order for the alteration of Blythe's assessment, had no knowledge of the facts or circumstances relating to it, or of the motives or reasons which induced the commissioners to consent to it. At the time of the submission of the arbitrators' report as to Blythe's assessment, the injustice and inequality of the rule adopted by the experts, and approved by the commissioners, for the appraisement of the value of property taken for the improvement, &c., were fully and clearly explained by one of the arbitrators to the commissioners (*Id.*, pp. 198–202). The commissioners, nevertheless, adhered to the unjust and unequal rule as against the plaintiff in error and all the other non-petitioning property owners.

The report and accompanying documents and data having been filed in the County Court, in obedience to its order, on October 27th (Rec., pp. 133, 134), was, on the same day, by order of the Court, allowed to be withdrawn by the commissioners, "for inspection," upon leaving with the Clerk their order or that of their attorney, "until the further order of the Court," and the hearing of the matter was then continued until October 31st (Rec., p. 243). There were subsequent regular continuances, from time to time, until November 24th, when an order was made allowing the objections of one William Sharp to be withdrawn, and they were then withdrawn, and an order made for a further continuance until December 1st (*Id.*, pp. 243, 244).

On December 1st, the hearing was continued to December 8th. But on the latter day nothing was done in the mat-

ter, and no order was made concerning it, either for a continuance to another day or for any other purpose (*Id.*, pp. 244, 245). On December 15th, the matter was again taken up without notice to any one, and the hearing was further ordered continued to December 18th. At that time the Court made and entered a series of orders for the alteration of the assessments of Blythe and others, as already mentioned, and in each case referring the report back to the commissioners for the purpose of such alteration, although the report could not then have been before the Court, having been withdrawn on October 27th, and no further order for refiling it having been made. Among those whose assessments were altered, in accordance with their petitions, on December 18th, was William Sharp, whose petition was withdrawn as heretofore stated (*Id.*, pp. 245–251). The hearing was then continued to December 19th, when, notwithstanding the fact that the report had already been referred back to the commissioners for modification and had not been again submitted by them, the Court made another order for the alteration of the report, and again referred it back to the commissioners for that purpose, and then continued the hearing to December 22d (*Id.*, pp. 251–252).

On December 20th, notwithstanding the order of the previous day continuing the hearing to December 23d, and the previous references of the report to the commissioners, who had not again submmitted it to the Court, the matter was again taken up without notice, and several further orders for the modification of the report in other particulars, and for its rereference to the commissioners for that purpose (Rec., pp. 252–254). There was no further continuance of the hearing in these orders.

On the same day, however, the final judgment of the Court confirming the report as modified was entered. The commissioners received information that on December 22d, to which day the matter had been continued from December 19th, some other property owners affected by the assessment intended to make opposition to the confirmation of the report (Rec., p. 287). Being apprehensive of the results

of this new opposition, and desiring to avoid further threatened objections to their report, the commissioner, in order to escape such opposition and objections, hurriedly made all the alterations required by the several previous orders of the Court, and on December 20th, presented their report, to the Court, thus modified with a petition for its confirmation. *The Court on the same day, two days before the time to which the hearing had been regularly adjourned made and entered an order or judgment finally confirming the report so modified.* This was *done without any hearing of any kind, or any opportunity for a hearing and without any notice to the plaintiff in error, or to any of the other parties affected* by the assessment (*Id.*, p. 136).

The report, as thus confirmed, shows on its face, that the cost, damages and expenses of the improvement amounted to $914,991 and greatly exceed the "the benefits" assessed against the property in the district designated in the act as "benefited" which are fixed at $796,837 (Rec., p, 259). But the commissioners were not content with even this excess. After the confirmation of their report, they issued bonds to pay for the improvement, not merely for the ascertained cost, &c., but for the sum of $1,000,000. The bonds are of $1,000 each, payable in twenty years from their date, January 1, 1876, with interest at seven per cent. per annum, payable semi-annually, and are in the form given in the Record, pp. 139, 146–148. The intervenors are owners of the bonds claimed in their complaint in intervention, having them at the times and for the amounts therein stated (*Id.*, pp. 25, *et seq.*, 140). But none of them purchased any of their bonds in good faith. On the contrary, they, each and all, took their bonds with notice that they were invalid, unauthorized and void (*Id.*, p. 140).

The plaintiffs in error have never, in any manner, consented to or acquiesced in the assessment. On the contrary, some of them, together with certain other persons commenced a suit in March, 1878, in the proper District Court of California to enjoin the Tax Collector from selling their property to pay the first installment of the

assessment, and obtained an order to show cause why such injunction should not be issued. But on the hearing of the motion therefor, the Court denied the injunction and dissolved the restraining order previously issued. The plaintiff's, in order to protect their property from forced sale on the account of the assessment, then paid the amount demanded, under protest, and dismissed their suit, without prejudice to a new action (Rec., pp. 138, 139, 140). And there is nothing in this record to show that any of the plaintiffs in error ever had any notice, knowledge or information of the proposed improvement until long after its completion, much less that any of them ever, in any way, consented to it or acquiesced in it, before or after its completion. The present action was brought to enjoin a sale of the property of the plaintiffs in error, to collect the taxes levied in the fiscal year 1878-9, to pay the interest and a part of the principal of the said bonds (Rec., p. 14.)

It should be observed that the plaintiffs in error are *not* the *makers* of the bonds.

They are property owners against whose property it is sought to enforce an assessment for benefits imposed *in invitum*, and they are simply resisting that attempted enforcement. The bondholders claim that the assessment is a valid lien upon the property for the payment of their bonds. This the plaintiffs in error deny. The bonds are the bonds of the City and County of San Francisco, and the rights of the bondholders as *against the city* are not in issue here.

The questions arising upon these facts and upon the face of the statute as indicated by the specifications of errors, are. 1st: Did the State Supreme Court err in holding that assuming the statute to be constitutional, the plaintiffs in error, and others affected by the said assessment were not in fact denied "due process of law" or "the equal protection of the laws" with respect to the said improvement, or the making, modification or confirmation of the said assessment, or deprived of "just compensation" for the burden imposed upon their property, in any of the particulars indicated in the

specifications? 2d. Did the State Supreme Court err in holding that the statute was and is constitutional, and that it awarded "due process of law" to the plaintiffs in error and others interested, and did not deprive them of "the equal protection of the laws" or of "just compensation" in any of the particulars mentioned in the specifications?

Specifications of Errors.

The plaintiffs in error maintain that, in the record and proceedings in this case, there is manifest error in this:

"I.—That by the record herein it appears that the sale "sought to be enjoined will deprive the plaintiffs in error "of their property without due or any process of law; and "that the assessment which it is threatened to enforce "was made secretly, fraudulently, *ex parte* and contrary "to law and the statute of California, entitled 'An Act "to authorize the widening of Dupont street, in the City "and County of San Francisco,' and was and is unjust and "excessive and will confiscate the property assessed; and "that plaintiffs in error have never had any day in court, "or opportunity to set up their defenses against said im-"position and assessment, and that if the final judgment "of the Supreme Court of the State of California herein "be not reversed, the property of the plaintiffs in error "will be taken and encumbered without due process of "law."

"II.—That the Supreme Court of California erred in "holding and deciding that the confirmation of the County "Court was valid and binding, and precluded all the ob-"jections urged to said assessment and to the report as "confirmed; whereas, as appears by the record herein, the "only notice and opportunity for a hearing provided by, "or permissible under, said statute, is that prescribed and "given in and by Sections 7 and 8 thereof, and the same "would not have constituted due process of law, even if "followed and allowed in good faith and by reason of the "frauds committed by the commissioners and set forth "in the findings of the Superior Court, and the fact, as "also shown by said findings, that said County Court did "not proceed judicially, but denied and rendered impossi-"ble even the limited opportunity for hearing given by

"the statute, said assessment and confirmation were void "as made and had without due process of law.

"III.—That said Supreme Court of California erred in "deciding that the plaintiffs in error, upon the facts had "by said findings, had legal and due notice and sufficient "opportunity to be heard before said County Court upon "all objections which they were entitled to raise to the "validity of said assessment and of the report of the com- "missioners, as modified and confirmed, and upon all ob- "jections which existed thereto as to the validity of said "statute; whereas the said statute did not provide for "due or any notice, or for appropriate, fair, or other op- "portunity to be heard upon any of said objections or de- "fenses, and as to all of their objections and defenses "they had no notice and no opportunity to be heard and "no day in court; and said report was allowed to be "made, modified and confirmed without notice or oppor- "tunity to be heard.

"IV.—That said Supreme Court of California erred in "deciding that the plaintiffs in error were not entitled "under and by the Fourteenth Amendment to the Consti- "tution of the United States to such opportunity to be "heard and to present their claims and defenses in said "County Court as is essential in ordinary judicial proceed- "ings, whereas said amendment does secure to them the "opportunity essential in ordinary judicial proceedings "before it can be finally determined against them that "said assessment was not fraudulently made to their in- "jury, or that a false rule was not intentionally adopted "and applied by the commissioners, or that said commis- "sioners were not interested and judges in their own "cause, or that said statute was not unconstitutional, or "that said assessment was not rendered void by reason of "said objections, or that said statute was complied with, "and the authority attempted to be conferred thereby "duly exercised, or that said County Court proceeded "judicially in all things, or that their property was "benefited, or benefited to the extent of the burden "imposed.

"V.—That said Supreme Court of California erred in "deciding that the Legislature had the power to declare "that the property of the plaintiffs in error was benefited "to the extent of the assessment afterwards to be made, "and that they were not entitled to any hearing upon

" that question, and had no right to a judicial decision " thereof, whereas the same is a judicial question upon " which they had a right to be heard.

" VI.—That said Supreme Court of California erred in " deciding that said statute awarded, and that there was an " adequate hearing and opportunity to be heard: whereas " neither the hearing and opportunity awarded by the " statute, nor that had, amounted to due process of law, " or was appropriate to the case, or just to the parties to " be affected, or was pursued in the ordinary mode pre- " scribed by law, or was adopted to the end to be attained, " or gave to the plaintiffs in errror an opportunity of be- " ing heard respecting the justice of the confirmation.

" VII.—That said Supreme Court of California erred in " deciding that the confirmation by the County Court was " valid, binding and conclusive, notwithstanding it ap- " pears on the face of the report so confirmed that the " burdens imposed were far in excess of the benefits, as " determined by the commissioners and the County Court.

" VIII.—That said Supreme Court of California erred in " not deciding that the said statute, entitled ' An Act to " ' authorize the widening of Dupont street, in the City " ' and County of San Francisco' was unconstitutional " and void by reason of its repugnancy to the Fourteenth " Amendment to the Constitution of the United States, " and as taking and incumbering the property of the " plaintiff in error withour due process of law, and deny- " ing to them the equal protection of the laws.

" IX.—That said Supreme Court of California erred in " not deciding that the assessment in question was not a " tax, but was an arbitrary imposition, made without due " process of law, and constituting a taking of property " without compensation; and not levied with any pretense " of uniformity, apportionment or equality, and that said " statute was an attempt to impose a tax or assessment, " without representation, to and upon a few persons " arbitrarily selected, and without compelling all those " benefited to contribute.

" X.—That said Supreme Court of California erred in " not deciding that the action of the County Court was " invalid, and the confirmation a nullity, as repugnant to " the Fourteenth Amendment to the Constitution of the

" United States upon the facts as shown in finding No.
" 32 of the Superior Court.

" XI.—That the Supreme Court of California erred in
" upholding the validity of said statute, entitled ' An Act
" ' to authorize the widening of Dupont street, in the City
" ' and County of San Francisco,' and in not deciding that
" the same was repugnant to the Fourteenth Amendment
" to the Constitution of the United States.

" XII.—That the Supreme Court of California erred in
" upholding the validity of the authority exercised by said
" commissioners, County Court, and other officials under
" the State of California, and in not deciding that the said
" authority, and the exercise thereof, was and is repug-
" nant to the Fourteenth Amendment to the Constitution
" of the United States."

BRIEF OF ARGUMENT.

I.

Assuming Dupont street act to be constitutional, plaintiffs in error nevertheless deprived of "due process of law, equal protection of the laws, &c."

1. FACTS ABOVE STATED TAKEN TOGETHER INDUBITABLY SHOW DEPRIVATION OF "DUE PROCESS" AND "EQUAL PROTECTION OF LAW" RESPECTING ASSESSMENT, &C. CONFIRMATION, THEREFORE, IS NOT CONCLUSIVE OR BINDING, ESPECIALLY IN VIEW OF LIMITED STATUTORY AUTHORITY, WHICH MUST BE STRICTLY CONSTRUED AND FOLLOWED.

(a.) *Facts as a whole show no "due process," or "equal protection" of law.*

The foregoing statement of facts in itself constitutes a powerful argument in favor of the reversal of the judgment of the Supreme Court of California in this case. It shows beyond doubt that, even assuming the act here in

question to be constitutional, there was, nevertheless, in the proceedings under it, an utter absence of every element necessary to constitute "due process of law" to the plaintiffs in error and others, with respect to the making of this improvement, and the making, modification and confirmation of the assessment, as well as a denial to them of the "equal protection of the laws" and of "just compensation" for property, taken and charged, and that the decision of the State Supreme Court of the contrary was and is clearly erroneous. It shows that even if "due process" was provided for in the act, it was not in fact accorded. It shows, on the contrary, that "secrecy, silence and celerity" were from the beginning to the close of the proceedings the watchwords of the promoters of this gigantic scheme of plunder.

The assessment was made clandestinely under a solemn injunction of secrecy by unsworn experts appointed without authority of law, and was adopted by the commissioners without investigation. Two of the experts who made it and one of the commissioners who adopted it were personally interested in property affected thereby, and indeed speculated in such property while the proceedings were pending, and thus not only were "judges in their own cause," but gambled upon their judgment before it was rendered. In making the assessment a grossly false, unequal and unjust rule for appraising damages and benefits was adopted, which made the burden upon the plaintiffs in error and others, vastly disproportional and two or three times as heavy as it was upon others, and this rule was approved and adhered to by the commissioners willfully and with full knowledge of its inequality and injustice. Nearly $200,000 in extravagant expenses unlawfully incurred and in "estimated expenses," which never were incurred, and most of which the commissioners knew never would be incurred, were deliberately added by them to the enormously overestimated cost of the improvement, in order to absorb the injustly ex-aggregated "benefits" reported by the experts.

When the monstrous job had been thus completed the

commissioners, knowing that, if it were brought to a hearing, no honest judge would permit it to be carried through, that the contrivers of it would go out of Court covered with infamy "as with a garment," took all possible pains to prevent such a hearing. They therefore, although the statute made it their duty to answer, and by it they alone were authorized to answer, filed no answers to the petitions of objectors to the assessment, and, by collusion and fraudulent arrangements with the objectors, consented to all modifications asked for merely to silence opposition and to prevent a hearing, and procured orders of Court allowing such modifications without any hearing, investigations, proofs, argument, explanation or judicial consideration, and without any knowledge by the Court of the facts or merits. In one instance the modification was made by private, unauthorized arbitrators, selected by the commissioners and the objector without the knowledge of the Court. The commissioners also knowingly consented to the application to property of objectors of an entirely different rule of appraising and assessing damages and "benefits" from that applied to the property of the plaintiffs in error and others, to the great injury of the latter. The orders of modification were made, too, after all interested except the objectors had been thrown off their guard by a discontinuance of and apparent abandonment of the proceedings.

These grossly unjust modifications having been thus secretly made through the Court, the assessment was stealthily smuggled into Court during an adjournment of the proceedings and confirmed on the same day by the fraudulent procurement of the commissioners without any hearing, consideration or knowledge of the facts by the Court, and in order to avoid such hearing, &c., and to prevent threatened opposition.

All this was done, too, without notice to the plaintiffs in error and others interested, in their absence, without according to them even an hour, much less a "day in Court," and without their knowledge or consent. By the different collusive modifications of the report the estimated aggre-

gate cost of the improvement was made to exceed the aggregate estimated benefits to the assessed property by nearly $120,000 as appears on the face of the judgment of confirmation. But not content with this, the commissioners, after confirmation, deliberately added nearly $100,000 more, so as to bring the aggregate burden upon those assessed up to a million dollars, and interest thereon for twenty years.

This monstrous, iniquitous and unlawful burden of debt was, in fact, stealthily whispered into being, beyond the hearing of the hapless and helpless victims selected to bear it; and like the infamous secret of Midas the more it was whispered the more shameful it grew. It increased both in size and atrocity at every breath. There was in this proceeding every defect, every variety of illegality and wrong that ever tainted a judgment. There were absence of notice, denial of opportunity for a hearing, excess and usurpation of jurisdiction, bold violation of law, open and secret fraud and collusion to deceive and mislead an honest court. And interwoven through all, and towering above all, there was the deliberate, wicked and hideous oppressiveness of the whole proceeding. From first to last it was foul and flagrant fraud and sham. The entire scheme, as carried out, was more like a levy of loot upon a district given up to sack and pillage, than like a lawful and honest assessment.

1. ASSUMING THE SUFFICIENCY OF NOTICE, THERE WAS NO REAL HEARING OR OPPORTUNITY THEREFOR, AND NO REAL DECISION EITHER BY THE COMMISSIONERS OR BY THE CONFIRMING COURT, WHICH OF ITSELF CONSTITUTES DENIAL OF "DUE PROCESS."

Assuming, for the sake of the argument, the constitutionality of the Dupont Street Act and the sufficiency of the notice provided for and given to those assessing thereunder, it is clear from the facts set forth in the statement that there was still no "due process" of law, because there was no real decision or judgment either by the com-

missioners or by the confirming Court. There is no pretense that there was any hearing before the commissioners. The commissioners simply delegated their duties to the experts appointed by them. But there was no hearing before the experts. The commissioners made such a hearing absolutely impossible by the injunction of secrecy imposed upon the experts. Neither did the commissioners make any real decision; they simply adopted the conclusions of the experts, without investigation.

Neither was there any hearing or semblance thereof before the County Court either with respect to the modification of the assessment or its final confirmation as modified. The orders of modification were made pursuant to collusive agreements between the Commissioners and certain objectors. The Court made them without any hearing whatever, and simply recorded as its orders the collusive agreements of the commissioners and objectors. The Court was never informed of the real facts respecting those modifications or of the real motives which induced the commissioners to consent to them. The mind of the Court never acted upon them.

There was no opportunity for a hearing before the County Court for the reason that the commissioners never filed any answer to any of the objections presented by the objectors to the report. The 8th section of the statute provided that the petitions of the taxpayers, feeling themselves aggrieved by the report, should be answered by the commissioners. There was no provision for any answer by any one else. The only hearing provided for was a hearing upon such petition and answer. The commissioners, however, never filed any answer to any of the petitions. It was stated in the opinion of the State Supreme Court, that the provision of the statute for answers to the petitions by the board was entirely immaterial, and that the only object of it was to prevent the matter from going by default, that this provision did not prevent any person interested from being heard.

As a matter of fact, we have seen that no answer was filed to any of the petitions, and each of them was per-

mitted to go by default. Thus there was no possible opportunity for any one interested to be heard, and, indeed, no one was heard. How could there be any hearing upon such a petition in the absence of any answer by the board, even assuming the provision for such an answer to be immaterial, since, as the State Supreme Court decides, the failure to file any answer operated as a default. The omission to answer was an admission of the averments of the petition. How could any one else contest those averments when the only party authorized by the statute to answer them admitted them to be true? But aside from the omission to answer the petition of "aggrieved" property owners, the frauds of the board and others, and the unauthorized discontinuances, &c., in the proceedings effectually precluded any hearing thereon. And a hearing upon the petition for confirmation was also prevented, not only by giving judgment thereon during an adjournment of the proceedings, but also by giving such judgment immediately upon the filing of the petition.

It thus appears that from the first step to the last in these proceedings there was never any hearing or opportunity therefor. There was never any testimony taken, and, indeed, there was never any issue framed upon which testimony could be taken. There was never any argument, explanation or discussion; and there was no real decision either by the commissioners or by the Court. The commissioners adopted the conclusions of the experts without investigation, and the County Court adopted these second-hand conclusions of the commissioners equally without consideration, without deliberation and without investigation into their merits.

This absence of any real hearing or deliberation or decision in this matter was itself a denial of due process, even assuming that all persons interested had sufficient notice of the proceedings. Judicial hearing, judicial deliberation or consideration and a judicial decision are as essential as notice to constitute process of law. Of what avail is notice of a proceeding to a party affected thereby, or even his actual attendance, if he is not heard—judicially

heard—when he makes his defense? Of what avail even is a hearing if, though heard, he is not heeded; if no judicial consideration is bestowed upon his cause or defense, and if there is no real, honest judgment of the Court upon it? Imagine the case of a party with due notice of a judicial proceeding affecting his property, and duly attending and submitting his defense. Suppose him to be heard with patience to the end, and then suppose that the tribunal ignores his defense entirely, and decides the case without any consideration, by mere guesswork, by a resort to the dice-box, by drawing lots or the like. Would it be pretended that such a party had "due process of law," even though the decision had the form of a perfect legal judgment? Unquestionably not. There must be a real decision or judgment in a real suit to entitle it to the presumption of absolute uncontrollable verity and immunity from collateral impeachment in another suit in the same or another court.

A judgment procured by fraud or collusion is not of that character (Earl of Bandon *vs.* Becher, 3 Cl. & F., 509; see also Jenkins *vs.* Robertson, L. R., 1st Scotch App., 117).

But our point is here, not that a judgment procured by fraud is collaterally impeachable, but that it is not a real judgment and that a real judgment is one of due process of law. A fraudulent judgment is not a real judgment for the reason that by the fraud the mind of the Court is prevented from acting upon the case. The fraud is interposed between the mind of the Court and the case; the Court decides not the case which is before it, but the case which is made to appear to be before it by the fraudulent contrivance of the parties.

A real and honest judgment is as essential as notice or the opportunity to be heard, to constitute the due process of law solemnly guaranteed to the humblest citizen of the republic by the fundamental law, before his life, liberty or property can be taken or injuriously affected. There must be a fair judgment founded on a judicial consideration of the merits of the case. Consideration is the vital essence of a legal judgment. "It is considered

by the Court" is the familiar and appropriate language of the judgment. Without judicial consideration of the facts and law of a case, at least in seeming, there can be no real, honest judgment, and without such a judgment there can be no "due process of law," whether the failure to render such a judgment be due to deliberate intention, or mistake, or misapprehension, or negligence, or to a mere caprice, whim, or "guess" of the Court.

Thus in Johnson *vs.* Milwaukee, 40 Wis., 326, an arbitrary assessment of the cost of an improvement upon benefited property, founded upon "a mere guess at the cost" and "at the benefits" and not at all upon an actual consideration or estimate of actual benefits and upon the actual cost, was held to be such a fraud as to warrant an injunction. To have permitted the enforcement of such a mere mockery of an honest assessment would have been undoubtedly to sanction a taking of the property assessed *pro tanto* without due process of law. See to the same point as the foregoing case: Merrill *vs.* Humphrey, 24 Mich., 175; N. J. R. R. *vs.* Suydam, 17 N. J. L., 25.

In the case last cited it was held in effect, among other things, that a decision founded upon a "guess" is not a judgment. In that case Mr. Justice Ford very pertinently remarks: "Whoever heard of a guessing tribunal established by law?"

In Spring Valley Water Works *vs.* Schottler, 110 U. S., 354, it was held, that the Supervisors of San Francisco, in fixing the rates for water furnished to said city under a section of the State constitution, "are bound "in morals and in law to exercise an *honest judgment as* "*to all matters submitted for their official determina-* "*tion.*" In the same action it was held that the parties furnishing such water are entitled to "due process of law" with respect to the fixing of rates, and it was in substance and effect declared that the honest judgment which the supervisors were bound to exercise was a part of, and essential to, this right to "due process of law."

A similar doctrine is laid down in the recent case of

Spring Valley Water Works *vs.* San Francisco, 82 Cal., 286, 305.

That was a fixing of water rates by the supervisors of San Francisco under the same section of the constitution. There, also, it was held, that in order to perform their constitutional duty the supervisors must exercise an *honest judgment* upon the question of the reasonableness and sufficiency of the rates, and that if they failed to do so, their decision could be set aside in a collateral suit in equity.

Mr. Justice WORKS in delivering the opinion of the Court, said: "The whole gist of the complaint is, that the "Board of Supervisors have *not* exercised their judgment "or discretion in the matter; that they have *arbitrarily,* "*without investigation, and without any exercise of judg-* "*ment or discretion, fixed these rates without any refer-* "*ence to* what they should be, without reference "either to the expense to the plaintiff necessary "to furnish the water, or to what is a fair "and reasonable compensation therefor; that the rates "are so fixed as to render it impossible to furnish "the water without loss, and so low as to amount "to a practical confiscation of the plaintiff's property. *If* "*this be true,* and the demurrer admits it, *a party whose* "*property is thus jeopardized should not be without a rem-* "*edy.* If the action of the board of supervisors was "taken as the complaint alleges, they have not in any "sense complied with the requirements of the con- "stitution, and their pretended action was a *palpable* "*fraud* which might result injuriously either to the plain- "tiff or the city and its inhabitants, and would "almost certainly work injustice to one or the other. "The constitution does not contemplate any such mode "of fixing rates. *It is not a matter of guess-work or an* "*arbitrary fixing of rates without reference to the* "*rights of the water company or the public.* When "the constitution provides for the fixing of rates or com- "pensation, it means REASONABLE rates and JUST compen- "sation. To fix such rates and compensation is the duty "and within the jurisdiction of the board. To fix rates

" not reasonable or compensation not just is a plain viola-
" tion of its duty."

The same principle applies here. The Dupont Street Commissioners in assessing the damages and benefits to accrue from the improvements authorized by the Dupont Street Act, and the County Court in revising their assessment, were both bound to exercise an honest judgment. It was not "a matter of guesswork or an arbitrary fixing" of damages and benefits.

The case of Windsor *vs.* McVeigh, 93 U. S., 278, 282, 283, is a valuable authority to the effect that a real hearing, real consideration, and an honest judgment are as essential as notice to constitute due process of law. In that case, the defendant in the action having been duly notified and having attended and answered, his answer was stricken out by the Court because he was a rebel, and judgment thereafter rendered against him. In a collateral action to recover property sold under this judgment the judgment was held void, because due process of law had not been accorded said defendant.

Mr. Justice FIELD, delivering the opinion, said: "It is difficult to speak of a decree thus rendered with moderation; it was in fact *a mere arbitrary edict clothed in the form of a judicial sentence.* * * *

"The doctrine invoked by counsel, that, where a court
" has once acquired jurisdiction, it has a right to decide
" every question which arises in the cause, and its judg-
" ment, however erroneous, cannot be collaterally as-
" sailed, is undoubtedly correct as a general proposition,
" but, like all general propositions, is subject to many
" qualifications in its application. * * *

"Though the Court may possess jurisdiction of a cause,
" of the subject matter, and of the parties, it is still lim-
" ited in its modes of procedure, and in the extent and
" character of its judgments. *It must act judicially in all*
" *things.* * * *

"The doctrine stated by counsel is only correct when the
" Court proceeds, after acquiring jurisdiction of the cause,

" according to the established modes governing the class to
" which the case belongs, and does not transcend, in the
" extent or character of its judgment, the law which is
" applicable to it. The statement of the doctrine by Mr.
" Justice Swayne, in the case of Cornett *v.* Williams, re-
" ported in the 20th of Wallace, is more accurate. 'The
" 'jurisdiction,' says the Justice, 'having attached in the
" 'case, everything done *within the power of that juris-*
" '*diction*, when collaterally questioned, is held conclusive
" 'of the rights of the parties, unless impeached for fraud.'
" 20 Wall., 250."

The doctrine of this case was expressly approved in United States *vs.* Walker, 109 U. S., 267.

In Rex *vs.* Commissioners, 7 East, 71, a decree of sewer commissioners, analogous to the confirmed assessment here, was held collaterally impeachable by showing that the legal jury had been dismissed and vicious jurors substituted; that the commissioners, instead of taking legal evidence and basing the hearing thereon, inquired around the country for their facts, &c. In that case Lord ELLENBOROUGH said: "Anything more alien from judicial pro-
" ceedings than these I never saw," &c., and he quashed the proceeding on *certiorari*.

So in Regina *vs.* Warton, 2 B. & Sm., 719, held that a decree of sewer commissioners was impeachable collaterally on *certiorari* for want of a hearing on a traverse of the original presentment after notice. And in Com. Dig. "Sewers," H. 2, it is laid down generally that such a decree, if not according to law and justice, is void.

The doctrine of all the cases above cited unquestionably applies here. There was here as complete an abnegation of judicial functions, and denial of "due process," as in any of the cases cited. No answer was stricken out, but it was not necessary. The commissioners, who alone were expressly authorized to answer any petition for modification purposely declined to do so in order to prevent a hearing, and by collusively consenting to the modifications asked, as well as by discontinuances, &c., deprived other parties

interested of all opportunity to file answers, even if the statute could be construed to permit such answers. Although there was no substitution of "vicious jurors," there was a substitution of unauthorized and interested experts. The County Court did not "guess at" its judgment or inquire around the country "for its facts," but it did far worse. It blindly adopted the orders and judgment collusively prepared for it, in utter ignorance of the merits, without investigation, without even a "guess" at the truth or right of the case, and without regard to the facts. Its judgment did not rise to the dignity of an honest "guess." Such a mockery of a judicial proceeding, such a mimicry of the forms of law, without its life or substance, cannot constitute "due process of law."

2. Entry of Collusive and Corruptly made Arrangements of Commissioners and Objectors as Orders of Court constitute Denial of due Process.

Aside from the fact that there was no hearing, &c., upon the various orders of the County Court for the modification and confirmation of the assessment, it appears that, in making those orders, the Court was merely ratifying certain fraudulent and collusive arrangements of the commissioners and various objectors, and adopting the same as its orders and judgment, without any consideration or knowledge of the facts or merits of the case. As was expressly found by the Superior Court, the commissioners consented to the modifications asked for by the objectors "for the sole purpose of inducing the objectors" to withdraw their objections and to prevent an examination of said report on its merits, without any disclosure to the Court of the circumstances under which the alterations were consented to, or of the motives that influenced the commissioners in consenting to the same (Record, pages 132, 133).

Orders so made by the Court as the amanuensis of some of the parties concerned in the proceeding, being merely

the collusive and corrupt arrangements, of the Commissioners and objectors, entered in the record, are entitled to none of the presumptions attaching to real judgments. They are not real, honest judgments.

It is well settled that a mere agreement of some of the parties to a cause, or their counsel, entered as the judgment of a court, does not constitute such a real judgment as is essential to "due process of law," but is a nullity (Kelly *vs.* Milan, 21 Fed. Rep., 868; Gaines *vs.* Relf, 12 How. (U. S.), 472, 537; Gay *vs.* Parpart, 106 U. S., 679; Ensminger *vs.* Powers, 108 *Id.*, 292, 301, 302).

In Kelly *vs.* Milan (*supra*), a mere agreement of certain parties to a suit thus entered as a judgment without other judicial action of the Court, was treated as a nullity in a collateral proceeding. The Court in that case said, citing Gaines *vs.* Relf, 12 How. (U. S.), 472, 537: "That "a collusive suit cannot be *res adjudicata*, because "there is not *a real controversy really litigated.*" The case of Gaines *vs.* Relf, was also a case of an agreement between certain parties to a suit entered as a decree, although that did not appear upon the face of the decree. The case of Gay *vs.* Parpart, 106 U. S., 679, was of the same kind, and it was there held that the pretended decree could not be allowed to stand in the way of doing justice between the parties. In Ensminger *vs.* Powers, 108 U. S., 292, the attorney for the defendant was allowed by the Court to determine whether or not the case fell within a prior decision, and refused to determine that question itself, and permitted the defendants' counsel to prepare and enter such a decree as he chose without the consent of the plaintiff's counsel. On a bill of review this decree was held a nulity. In the opinion, the Court cited McVeigh *vs.* United States, 11 Wall, 259, as holding that the defendant was denied a hearing, and that "the first principles of "the due administration of justice were violated," and then went on to say: "Equally in the present case, the plain-"tiffs in the suit were denied a hearing, and their answer "might as well have been stricken out. In addition "to this, *there was no judicial action by the*

" *Court*, and the defendant was allowed virtually to " decide the cause in his own favor. For these reasons it " must be held, that the decree in question cannot, in this " suit, be regarded as a decree adjudicating any rights be- " tween the parties to the former suit, and that it forms " no obstacle to the consideration of the issues raised in the " present suit." Elsewhere in the opinion, the Court said that in the former suit "the *functions of the Judge were* " *abnegated.*"

The doctrine of these cases applies here. The orders of modification were, as we have seen, mere collusive arrangements between the commissioners and individual objectors. The Court entered the orders blindly, without any hearing or knowledge or consideration of the facts.

By the fraudulent and collusive consent of the commissioners *each of the objectors was allowed to enter such a judgment in his own cause as he chose.* Other taxpayers assessed to pay for this improvement, who were injured by such modifications, were denied any opportunity to be heard against them. There was here, therefore, as complete an *abnegation of the functions of the Judge* as in any of the cases above cited. The same is true with respect to the final decree of confirmation. That decree was really prepared and entered by the commissioners without any consideration by the Court. The commissioners thus, in effect, decided the case themselves.

This case calls more strongly for the application of the doctrine of the decisions above cited because of the fraudulent intent of the commissioners. The finding of the Superior Court heretofore quoted shows that the commissioners consented to the several modifications of the report for fraudulent and corrupt purposes. The object they had in view was simply to silence the objectors by granting their demands and thus preventing opposition to the confirmation of the report. It was just as clear a case of bribery as if the commissioners had paid the objectors in money to induce them to withdraw their objection.

The only difference between this case and the case of ordinary vulgar bribery is, that here the bribe was paid out

of the pockets of the taxpayers, while in ordinary cases the briber generally pays the bribe himself.

3. Adoption of False, Unequal and Unjust Rules of Estimate and Appraisement of Damages and Benefits, also a Denial of Due Process.

It appears from the findings of the Superior Court, and indeed is not disputed, that the experts, who really made the assessment here in question, adopted a false rule in estimating damages and benefits, a rule which was not uniform or equal or just to those assessed, and which was particularly unjust to the plaintiffs in error and others assessed for the improvement who owned property on the east side of Dupont Street. By this false, unequal and unjust rule the experts allowed as damages for the property on the west side of the street, taken for the improvements, *about two hundred per cent. more than its real value*, and omitted from the benefits justly assessable against all of the owners on that side of the street *about two-thirds of the actual* benefits (Record, pp. 128 and 129).

The commissioners, in adopting the reports of the experts as their own report, of course, approved and adopted this unjust rule. If they looked into the matter at all, they must have known the inequality and injustice of the rule adopted; but whether they did or not they were certainly informed of it before their report was presented for final confirmation. It was fully explained to them by one of the arbitrators selected to fix the amount of Blythe's assessment. His testimony proves the injustice of that rule beyond doubt or cavil (Record, pp. 197 to 202).

The commissioners nevertheless deliberately and willfully adhered to this rule as against all except those who had the good fortune to obtain knowledge of the facts in time to present their objections to the County Court. It is admitted by the learned Judge who delivered the opinion of the majority of the State Supreme Court that this false, unequal and unjust rule of assessing damages and benefits

was thus adopted and adhered to. He says: "It is "averred that the commissioners willfully and inten- "tionally determined the value of lots taken to be more "than three times as much as they in fact were, and "omitted from the estimate of benefits to the same lots "about two-thirds of the actual benefit. This overesti- "mate of damages and underestimate of benefits, so far "as I can judge from the statement of the case in the re- "cord, seems to be fully sustained" (Record, pp. 354, 355).

The injustice of this rule as originally adopted was aggravated by applying a different rule in the case of certain property owners on the east side of the street who filed objections to the original assessment (Record, p. 133).

In the case of BLYTHE, especially, the commisssioners deliberately and knowingly consented to the application of a different rule to his property from that applied to the property of the plaintiffs in error. They protested, at the same time, that the rule thus applied to BLYTHE'S property was entirely incorrect, and that it was not in accordance with their theory of the statute (Record, pp. 145 and 146).

For the purpose of arriving at the amount of BLYTHE'S assessment, the commissioners consented that the arbitrators should compute anew the value of all the property taken, just as if nothing had been previously done, the value being estimated according to the rule which should have been applied to all. By this rule the inflation was squeezed out of the extravagant and enormous valuation fixed upon the property taken, and BLYTHE was assessed merely for his proportion of the reduced valuation, as were also the other objectors, while non-objectors were assessed for their proportion of the inflated valuation. By this means the burden of the assessment upon non-objectors was increased, as we have seen, more than $100,000 (Record, page 133).

We submit that, even if there had been full notice and an opportunity to be heard with respect to the entire assessment, as to all the parties affected by it, this adoption

of a false, unequal and unjust rule of estimating damages and benefits, to the advantage of some of those assessed and to the gross injury of others, and the subsequent corrupt adoption of a different rule as to certain objectors to induce them to withdraw their objections, would have deprived such hearing of all value, and would have constituted a denial of "due process of law." Much more is it so here where, as we contend, there was no notice and no hearing.

It is well settled that where an assessment of this kind is made under a false, unequal and unfair rule of estimating damages and benefits, so as to bear more hardly upon some than upon others, or where it is otherwise made arbitrarily, or without or contrary to evidence, upon clearly erroneous principles, it is void and collaterally impeachable, and its enforcement may be enjoined even though it has been confirmed as being made without or in excess of jurisdiction and without "due process of law." *

The learned Judge Cooley says that where such an assessment is "purposely made too high * * * through "the adoption of *a rule which is designed to operate* "unequally upon a class and to violate the constitutional "rule of uniformity, the case is a plain one for the equitable "remedy by injunction" (Cooley Tax., 2d Ed., 785, 218, 248).

In Balfour *vs.* Portland, 28 Fed. Rep., 739, speaking of such an assessment, the Court said: "The assessment and "levy in question is a quasi judicial proceeding; and, the "subject matter being within the jurisdiction * * *

* Cooley Tax., 2d Ed., 218, 248, 785; People *vs.* Lynch, 51C al., 15; Preston *vs.* Hill, 38 Cal., 686; Jacobus *vs.* Oakland, 42 Cal., 22; Foote *vs.* Milwaukee, 18 Wis., 274; Johnson *vs.* Milwaukee, 40 *Id.*, 315; Marsh *vs.* Clark Co., 42 *Id.*, 502, 510; Watkins *vs.* Zweitusch, 47 *Id.*, 513; Tainter *vs.* Lucas, 29 *Id.*, 375; Schettler *vs.* Ft. Howard, 43 *Id.*, 48; Goff *vs.* Outagamie Co., *Id.*, 55; Salscheider *vs.* Ft. Howard, 45 *Id.*, 519; State *vs.* District Court, 29 Minn., 65; Mayall *vs.* St. Paul, 30 *Id.*, 294; State *vs.* Jersey City, 40 N. J. L., 485; Hassan *vs.* Rochester, 67 N. Y., 528; Same case, 65 *Id.*, 516; Kennedy *vs.* Troy, 14 Hun, 308; Longley *vs.* Hudson, 4 Thomp. & C., 353; People *vs.* Yonkers, 39 Barb., 271; Chicago, &c. R. R. *vs.* Cole, 75 Ill., 592; Porter *vs.* Rockford, &c., R. R. Co., 76 *Id.*, 561; St. Louis *vs.* Meier, 77 Mo., 13; Christian *vs.* O'Neal, 46 Miss., 672; Balfour *vs.* Portland, 28 Fed. Rep., 739; Cummings *vs.* National Bank, 101 U. S., 157; Keigwin *vs.* Drainage Commrs., 115 Ill., 347; Elwood *vs.* Rochester, 43 Hun, 102.

"*so long as no rule or principle is violated,* can not be "questioned collaterally. * * * *But an overvaluation* "*of property which is the result of improper motives* * * * *or the adoption of a rule of valuation designed* "*to operate unequally on a class in violation of the con-* "*stitutional requirement of uniformity, may be corrected* "*in equity by an injunction.*"

In the case now under consideration the false, unequal and unjust rule was purposely and willfully adopted, or at least adhered to, by the commissioners, as the State Supreme Court admit in their opinion. Hence the rule of these authorities unquestionably applies to the case.

The omission in this case of so large a proportion of the actual benefits was tantamount to omitting to assess a portion of the property included in the assessment district. There is abundant authority for the position that the intentional omission of property from such an assessment which is legally subject thereto, either by the adoption of wrong rules or principles of estimate and appraisement or otherwise, resulting in an increase of the burden upon some of those assessed, while relieving others of their just proportion of such burden, renders the entire assessment void notwithstanding its confirmation.*

The more especially is this so where, as here, the omission was made for the purpose of preventing or suppressing opposition to the confirmation of the assessment. (St. Louis *vs.* Meier, 77 Mo., 13.)

If the omission of a single lot legally subject to the assessment will render void an entire assessment, notwithstanding its confirmation, as was held in People *vs.* Lynch, 51 Cal., 15, and other cases above cited, how much more must it be so here, where fully two-thirds in value of half of the property assessed is thus omitted, proportionally increasing the burden upon owners of the

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* People *vs.* Lynch, 51 Cal., 15; Hassan *vs.* Rochester, 65 N. Y., 516; Same case, 67 *Id.*, 528; *Re* New York, &c., School, 75 *Id.*, 324, 328; Kennedy *vs.* Troy, 14 Hun, 308; Longley *vs.* Hudson, 4 Thomp. & C., 353; Greensburgh, &c. Co. *vs.* Sidener, 40 Ind., 424; Weeks *vs.* Milwaukee, 10 Wis., 242; Hersey *vs.* Milwaukee Co., 16 *Id.*, 185.

other half of the property, and where afterwards there was a still further omission of nearly $100,000 of the actual benefits to certain property assessed, made directly as bribes to the owners to prevent their opposition to the fraudulent scheme? If the glaring injustice caused by these omissions is not sufficient to annul the entire assessment, the commissioners, or rather the experts, might with equal impunity have omitted substantially all the benefits upon property on the west side, or upon all the property, except that of a single owner, imposing merely nominal assessments on the rest and throwing the entire burden upon a few or on a single property owner.

The adoption of the false and unjust rules of estimating the damages and benefits to which we have referred, and the intentional omission of so large a portion of the real benefits to part of the assessed property are still more fatal, in view of the fact that the statute required the assessment to be strictly proportionate. In Section 7 it was enacted that the Board "shall set against each lot or subdivision " the sum or amount in which according to the judgment " of the Board the said lot has been or will be benefited by " reason of the widening of said street RELATIVE TO THE " BENEFITS ACCRUING TO OTHER LOTS OF LAND WITHIN " SAID DESIGNATED DISTRICT." Hence the commissioners in approving and adhering to the false, unjust and disproportionate rule adopted by the experts were deliberately disobeying the statute. They were assessing part of the property upon one basis, and another part of it upon an entirely different basis. They were not assessing the benefits to property upon the west side of the street "rela- " tively to the benefits accruing" to property on the east side of the street. All relativity in the assessment was entirely destroyed by the adoption of this rule, and by the other inequalities complained of.

The commissioners thus divested themselves of all jurisdiction and power under the statute. It commanded them to make the assessment strictly relative or proportional. They had no authority or power to make any other kind

of an assessment. When they disobeyed the statute and went contrary to its explicit and positive command by adopting a false, unequal and unjust rule, which destroyed the relativity of the assessment they departed beyond the boundaries of their jurisdiction. It was as if they were undertaking to make an assessment without the authority or sanction of any statute whatever. The proceedings were entirely illegal and void, except within the strict confines of the statute. The assessment being thus void *ab initio* by reason of the false and grossly disproportionate rule of appraisement adopted in making it, the confirmation of it was also void, whether the fact of its invalidity appeared upon the face of the assessment or not. As already shown, a void assessment cannot be validated by confirmation. On the contrary, confirmation merely confirmed its invalidity. If the fact of the adoption of the false rule mentioned be assumed to appear on the face of the assessment, its confirmation was still more clearly void. In that case, the confirming court must be presumed to have known that it had no jurisdiction or power to confirm it.

The only answer to the foregoing objection made by the State Supreme Court is, that as the adoption of the false rule appeared on the face of the assessment, the plaintiffs in error and others injured by it might have obtained relief in the confirming court. As the same answer is made to other objections we reply to it here, once for all. Assuming that the fact of the adoption of the false rule, &c., did appear on the face of the assessment, and assuming even that the plaintiffs in error knew it before the confirmation, we maintain that it would not now make the assessment valid against them. If the plaintiffs knew the fact they must be presumed to have known also that it rendered the assessment absolutely void for want of jurisdiction and due process of law. Even if they could have obtained relief against it on that ground in the confirming Court they were not bound to do so. In the case of any judgment void for want of jurisdiction the debtor could no doubt be relieved against it on motion or by ap-

peal, but there is no principle of law or equity which requires him to do it. (See Whitley *vs.* Black, 11 Am. Dec., 753; Fitzhugh *vs.* Custer, 51 *Id.*, 728.) He may safely remain inactive until it is sought to be enforced. Setting it aside or reversing it cannot make it any more thoroughly void, and affirmance of it cannot validate it. The same is true of this assessment. As it was void *ab initio*, those assessed were not called upon to do anything until it was attempted to be enforced.

But there is nothing in the record of this case to indicate that the plaintiffs in error ever knew of the adoption of the false rule or even heard of the assessment before its confirmation. Besides, even if they knew it they were precluded from obtaining a hearing against it by the fraud and collusion of the commissioners and others, and by having the orders of modification and the judgment of confirmation smuggled through the County Court without answer, after discontinuance and during an adjournment.

And, furthermore, it certainly does not lie in the mouths of the bondholders to claim that they are entitled to enforce this assessment because its invalidity, on this or on any other ground, appears on the face of it, and might have been known to those assessed. If those assessed knew it, the bondholders knew it also. If they voluntarily invested their money on the faith of an assessment void on its face, they did so at their own proper peril, and can claim nothing at the hands of those upon whom, *in invitos*, the void assessment was imposed.

4. Continuance and Discontinuance of Proceedings and Making Order of Confirmation Pending Adjournment as Denial of "Due Process."

It was provided in Sec. 8 of the act that where one "feeling himself aggrieved" by the action of the commissioners, "as shown in their report," filed his petition in the County Court, setting forth his objections and praying an order requiring the board to file its report and certain documents and data in court, the Court should "set

the same down for a hearing within ten days from the date of the filing thereof." The act nowhere contains any provision for a continuance of the hearing upon any such petition. And, we submit, that without any such express authority, the Court had no power or jurisdiction to continue the hearing of any petition, but was bound to hear the same upon the day set.

In this case it appears from the record that in no single instance was a petition heard upon the day set for its hearing at the time of its filing. In the case of every petition there were numerous continuances of the hearing (Record, pp. 211, *et seq.*).

Except in one or two instances there was a single order for continuance of the hearing with respect to all the petitions. Now, if the Court had not, as we claim that it had not, any authority under this statute to continue the hearing of any petition, we submit that by the making of such orders of continuance it divested itself of its jurisdiction, and that any order thereafter made with respect to the modification or confirmation of the assessment was an absolute nullity, being *coram non judice*. Assuming that there could be more than one petition, the Court was bound to hear each of them on the day set for such hearing in the original order, and failure to do so divested its jurisdiction.

There is no lack of authority for the position that in cases of this sort there is no power to grant a continuance except such as is expressly provided for in the act authorizing the proceeding. In Hogan *vs.* Baker, 2 E. D. Smith, 22, and Weeks *vs.* Lyon, 18 Barb., 531, where a statute provided that a justice should proceed to hear proofs, &c., not exceeding six days after the return of summons, it was held that he could not adjourn the hearing beyond that time without working a discontinuance and putting the cause out of court. So, it has been held in California that a court or tribunal exercising a special statutory authority in a proceeding not known to the common law cannot adjourn or continue such proceeding or grant a new trial therein unless the statute expressly authorizes

it, and then, only, in the circumstances, and to the extent, that it is so authorized (Whitney *vs.* Delegates, 14 Cal., 503; Dorsey *vs.* Barry, 24 *Id.*, 452).

In the case at bar, as we have seen, the statute required the County Court in peremptory terms to set down a petition for hearing "*within ten days from the date of the* fil-"ing thereof." Upon the principle applied in Hogan *vs.* Baker and Weeks *vs.* Lyon (*supra*), the hearing could not be adjourned beyond the ten days without working a discontinuance and putting the cause out of court.

As a matter of fact, by various discontinuances some of the petitions were finally set for hearing and heard a month or more after the "date of the filing thereof."

If we are correct in the foregoing positions, then, certainly, all of the orders of modification as well as the final decree of confirmation in this case were entirely unauthorized and void. They were each and all of them made long after the time when the statute authorized them to be made.

It is clear, too, that the omission in this statute to provide for continuances was by no means accidental. There were express provisions for such continuances in the earlier statutes, after which this act was undoubtedly modeled, which acts are construed in San Francisco *vs.* Certain Real Estate, 42 Cal., 514; Piper's Appeal, 32 *Id.*, 530; and other California cases. When these provisions were omitted in this act it must have been on the ground that it was intended that there should be no continuances. No other reason for such an omission can be imagined.

But, however this may be, there was in one instance a clear actual discontinuance of the proceedings under this Act whereby they were put entirely out of court. On December 1st, as appears from the statement, the further hearing of the matter of this assessment was adjourned by order of the County Court to December 8th. On December 8th no order whatever was made, and there is nothing in the record of the County Court to show that the matter was taken up on that day (Record, pages 244 and 245).

Then on December 15th the matter was again taken up, without any adjournment of the proceedings to that day, and without any new notice to any of the parties concerned (*Id.*, page 255).

Here then, on December 8th, was a clear discontinuance of the proceedings and a tacit abandonment of the further prosecution of the assessment. The orders for the modification of the report, as well as the final decree confirming it, as modified, were all made after December 8th without any new notice or warning to the parties. We submit that this discontinuance was fatal to all of the subsequent proceedings. It was fatal to all claim or pretense of "due process of law" and to the jurisdiction of the County Court to make the several orders of modification as well as the final decree of confirmation. It was as fatal as the striking out of the defendant's answer in Windsor *vs.* McVeigh, 93 U. S., 274. It did away with the effect of all previous notice, however ample may have been such notice, and put an end to all further obligation upon the part of those assessed to appear and contest the proceedings (7 Rob. Pr., 76, note 276).

Assuming, as the defendants in error claim, and as the State Supreme Court held, that the original notice that the report was "open for inspection" was sufficient to warn those assessed of all subsequent proceedings, it could not bridge the chasm occasioned by this discontinuance.

Even if those assessed had been actually and legally notified of the filing of the petitions of each of the objectors and of the several orders setting the same down for hearing at a specified time, they could not possibly be held to appear at any future time to which the hearing might be adjourned without authority, or on which the commissioners might see fit to take it up after having apparently abandoned it.

Assuming that those assessed had such notice as to bind them to appear at their peril on December 8th, to which day the hearing was adjourned, it could not possibly be maintained that when the matter was not taken up on that day they were, nevertheless, bound to remain

in attendance until it suited the convenience or caprice of the petitioners or commissioners to go on with the proceedings, though it might be for a week or a month, or even for years.

But aside from this discontinuance, it appears that on December 19th after a certain order for the modification of the report had been made, the Court adjourned the further hearing to December 22d; but, on December 30th, pending this adjournment, the commissioners came into court, and, after having consented to some further orders of modification, presented the report as modified, and had it confirmed immediately, two days before the time to which the hearing had been adjourned. And this was done, as the Superior Court expressly found, and as the evidence shows, for the purpose of avoiding further threatened objections to the confirmation of the report (Record, pages 136, 287).

It was done, too, without any new notice to the plaintiffs in error or any of those assessed, and without any hearing or opportunity for a hearing. It was done indeed to prevent a hearing (*Id.*, page 136).

It seems to us idle to say that by this outrageous proceeding there was no deprivation of "due process of law," however ample the original notice might have been. It cannot be that notice to a party to appear and defend against an action on a specified future day, is notice to him to be in constant attendance *before* that day to prevent a taking of a judgment against him. It cannot be that notice to appear on a certain day is "due process of law" to uphold a judgment pronounced two days *before* the day appointed. As well might it be claimed that notice *after* judgment is due "process of law" to support it. There is no principle laid down in any law book upon which notice of an action, especially constructive notice, can have such a retroactive effect as to bind a party to attend at his peril before the day when the notice expressly requires him to appear so as to conclude him by a judgment rendered at any time before that day. Still less is there any principle upon which

in a special statutory proceeding of this sort a notice to appear at a certain day can be held to be due process to validate a judgment rendered before that day.

When the hearing here in question was adjourned to December 22d, the parties, assuming them to have been brought into court by previous notice, were dismissed from attendance and distinctly notified that they need not appear further until the day appointed. They were in effect turned out of court until that day; and yet, in their absence, a judgment was surreptitiously and fraudulently obtained against them. To hold that by such a proceeding they were awarded due process of law with respect to the judgment, and that the judgment is, therefore, binding upon them, would be contrary not only to the plainest legal and constitutional principles, but also to the dictates of natural justice and right reason.

That a proceeding taken against a party to a cause after a regular adjournment of the hearing to a future day and before the day to which it has been adjourned is void, see Donnelly *vs.* Blackwood, 13 R. I., 180; Casas *vs.* State, 12 Tex. Ap., 61; State *vs.* Castle, 44 Wis., 671; Clark *vs.* Holmes, 1 Doug. Mich., 391; Tompkins *vs.* Clackamas Co., 4 W. C. Rep., 598.

The order of confirmation which was thus smuggled through the County Court was the final order consummating and crowning the proceedings and rendering the assessment forever binding, if it is to be binding at all. If those assessed were ever to be heard at all, they were entitled to be heard against the final order. Notice and a hearing as to every other step in the proceedings were of no worth or service without a hearing upon that order; all else was merely preliminary to that. But the surreptitious procurement of this order during an adjournment of the proceedings effectually precluded and was intended to preclude any hearing against it.

This was as clear and flagrant a denial of due process as the striking out of the defendant's answer in Windsor *vs.* McVeigh, *supra.*

What possible essential difference can there be between

denying a party a hearing by adjourning the action against him to a future day and then surreptitiously taking judgment against him during the adjournment, and depriving him of the benefit of a hearing by striking out his defense when made?

5. INTEREST OF COMMISSIONERS AND EXPERTS IN THE PROPERTY AFFECTED BY THE ASSESSMENT ALSO OPERATED AS DENIAL OF "DUE PROCESS."

It is admitted by the pleadings that BRYANT, one of the commissioners, and president of the board, was the owner of one of the lots affected by this assessment, and that he was such owner not only before the assessment proceedings were commenced, but continued so to be until after the assessment was confirmed (Record, pp. 11, 48, 74).

It also appears that one of the experts who in reality made the assessment, purchased a portion of the property affected by the report, after the same had been made, but before it was submitted to the commissioners, for the sum of $75,000; that another of the experts acted as broker for his fellow expert in this transaction, and that BRYANT, one of the commissioners, joined with the purchaser in a note for $60,000 given for the unpaid portion of this purchase money (Record, pp. 137, 138).

Commissioner BRYANT and these two experts were, therefore, in the making and adoption of this assessment clearly acting as "judges in their own cause." This of itself necessarily operated as a denial of due process of law to those assessed, even assuming that they all had ample notice and ample opportunity to be heard.

In every step of the proceedings the opportunity for a hearing involved in the guaranty of due process opportunity to be heard before a disinterested and impartial court. Where a suitor in a cause is accorded a hearing before a judge who is himself interested, and is in reality a party to the cause, he is more gravely prejudiced than if he were denied any hearing whatever before a disinter-

ested and impartial court. BRYANT and the interested experts were in reality parties in interest.

It is a maxim as old as civilized jurisprudence that no man can lawfully sit as a judge in his own cause. Says the learned Judge COOLEY on this point: "There is also a "maxim of law regarding judicial action which may have "an important bearing on the constitutional validity of "judgments in some cases. No one ought to be a judge "in his own cause; and so inflexible and manifestly just "is this rule, that Lord Coke has laid it down that 'even "'an act of Parliament made against natural equity, as to "'make a man a judge in his own case, is void in itself.' "* * * * This maxim applies in all cases where "judicial functions are to be exercised, and excludes all "who are interested, however remotely, from taking part "in their exercise. It is not left to the discretion of a "judge, or to his sense of decency, to decide whether he "shall act or not; all his powers are subject to this abso-"lute limitation. * * * It is matter of some interest "to know whether the legislatures of the American states "can set aside this maxim of the common law, and by "express enactment permit one to act judicially when in-"terested in the controversy. * * * To empower one "party to a controversy to decide it for himself is not "within the legislative authority. * * * *Nor do we see how "the objection of interest can be waived by the other party.* "If not taken before the decision is rendered, it will "avail in an appellate court; and the suit may there be dis-"missed on that ground. The judge acting in such a case "is not simply proceeding irregularly, *but he is acting with-"out jurisdiction. And if one of the judges * * * is "disqualified, * * * the judgment will be void, even "though the proper number may have concurred in the "result, not reckoning the interested party.*"

Cooley Const. Lim. (4th Ed.), *410–413.

The doctrine that pecuniary interest of the judge, or one of several judges, in the result of the controversy, or in the property involved therein, is a fatal jurisdictional de-

fect, avoiding the judgment of such judge or judges in such controversy, especially where the tribunal is not sitting as a Superior Court, proceeding according to the course of the common law, but is exercising a limited statutory authority is supported by an unbroken array of authority.*

Mr. Wells says that this rule is applied with more strictness to commissioners than to judges of ordinary Courts. (Wells Jur., Sec. 419.)

In State *vs.* Newark, 1 Dutch., 405, the foregoing doctrine was applied to a case of an assessment for special benefits, and it was held that one interested in the assessment could not participate in the making of it; that such an interest was not like that of a general taxpayer, but was direct and immediate, such an assessment being simply an apportionment and adjustment of the specific burden among those assessed, in the making of which an interest in a part of the property would as matter of common knowledge exercise a strong influence; that the maxim that one ought not be judge in his own cause has always been regarded in England as elementary and fundamental in judicial action; that this rule cannot be materially invaded by the Legislature any more than it could authorize a judge to decide a cause by lot or in favor of the highest bidder; that the Legislature is, indeed, utterly impotent to break down this great barrier against tyranny and fraud; that the rule is inherent in and a part of the nature of judicial action, and that although the Legislature may in many things provide for the exercise of judicial functions, it cannot in so doing lose sight of the essential nature of judicial action, and authorize or sanction a

* Wells Jur., Sec. 419; Hawes Jur., 35; Freem. Judg., Sec. 144; People *vs.* De La Guerra, 24 Cal., 73; White's Estate, 37 *Id.*, 192; Oakley *vs.* Aspinwall, 3 N. Y., 547; Washington Ins. Co. *vs.* Price, 1 Hopk. Ch., 1; State *vs.* Newark, 1 Dutch., 405; State *vs.* Crane, 36 N. J. L., 398; Hall *vs.* Thayer, 105 Mass., 221; People *vs.* Gies, 25 Mich., 83; Stockwell *vs.* White Lake, 22 *Id.*, 341; Hunt *vs.* Chicago, 60 Ill., 183; Regina *vs.* Cheltenham, &c., 1 Ad. & El. (N. S.), 467; Regina *vs.* Aberdare Co., 14 *Id.*, 854; Regina *vs.* Justices of Hertfordshire, 6 *Id.*, 753.

judgment through instrumentalities repugnant to innate and universally recognized principles of natural justice, because the power to render such a judgment would not be judicial. Similar principles are laid down in State *vs.* Crane, 36 N. J. L., 398.

In People *vs.* Gies, 25 Mich., 83, the same principles were applied in a case of collateral attack upon a judgment of a constitutional court rendered in the exercise of a limited jurisdiction. A decree of sewer commissioners in England, exercising functions similar to those of the commissioners in this case, may be collaterally attacked on the ground that one of the commissioners was interested in the result (Regina *vs.* Cheltenham, &c., 1 Ad. & El. [N. S.], 467); and so of decrees of other tribunals exercising similar jurisdiction (Regina *vs.* Justices of Hertfordshire, 6 *Id.*, 753; Regina *vs.* Aberdare Co., 14 *Id.*, 854).

An assessment of this kind participated in by an interested commissioner is, as respects the jurisdiction, the same as an assessment made by unauthorized persons, strangers to the statute. Nay, it is far worse. It is like the judgment of a bribed judge. There is not merely want of jurisdiction, but there is also fraud. The very fountain of justice is corrupted. No law can compel a party to submit to a pretended judgment rendered by a judge interested in the suit. Not even his own tacit consent can preclude such a party, as Cooley says, from contesting the validity of such a judgment when sought to be enforced against him.

The suggestion of the State Supreme Court that Bryant's interest appeared on the face of the report and might have been taken advantage of in the County Court, is obviously not well founded. The *Act* made Bryant a commissioner. It made no provision for the substitution of any one else in his place, nor did it authorize the County Court to set aside the assessment and order a new one on that or any other ground. All it could do at most was to order modifications, and since, as Cooley says, a party cannot waive the objection that a judge pronouncing judgment against him is interested in the cause adversely

to him, even if Bryant's interest and that of the two experts had been actually known to the plaintiffs in error at and before the confirmation of the assessment it would make the assessment any the less void. If the fact appeared on the face of the report it simply made it all the more clear that the County Court had no power to confirm it, and that the bondholders knew when they purchased their bonds that the assesment was void.

II.

Dupont Street Act Unconstitutional in not Providing for Due Process of Law, Awarding Due Process of Law, the Equal Protection of the Laws, &c.

1. STATUTE AUTHORIZING SPECIAL ASSESSMENT OR OTHER LIKE PROCEEDING MUST PROVIDE FOR DUE PROCESS OF THOSE AFFECTED BY IT, IN ORDER TO BE CONSTITUTIONAL, AND SUCH PROVISION CANNOT BE IMPLIED INTO THE STATUTE AFTER THE PROCEEDING IN ORDER TO VALIDATE IT.

The right to "due process of law" or to a hearing before judgment is the corner-stone of the whole law of *res adjudicata*. A great English judge long ago declared that "there is no jurisdiction in this kingdom, where a "defendant can be convicted unheard" (Rex *v.* Justices, 3 Burr., 1532, per Yates, *J.*). Certain it is that since the 14th Amendment to the Federal Constitution, there is no jurisdiction in this Republic in which a man can be condemned in judgment unheard in any proceeding affecting life, liberty or property. And no such jurisdiction can be created. The prohibition in the 14th Amendment extends to the Legislature as well as to other branches of the several State Governments. No State Legislature can authorize any proceeding to be taken against life, liberty or property without affording "due process of law" to those interested. It is accordingly well settled that a statute authorizing an assessment or other proceeding which may result in a divestature of property or in fasten-

ing a lien thereon, must, in order to be valid, provide for due notice and an opportunity to be heard to those affected by it.*

Although it is conceded in the "Elevator cases" and other like adjudications in this Court, that the states have very ample and extensive powers as to limiting the charges of common carriers, &c., yet it is well settled that a State statute making the decisions of railroad commissioners conclusive respecting what are "reasonable charges" by such carriers without awarding "due process of law" to the carriers is unconstitutional (Chicago, &c., Co. *v.* State, 134 U. S., 418; Minneapolis, &c., Co. *v.* State, *Id.*, 467). And so as to statutes upon any other subject. This rule is applied with special stringency to statutes authorizing assessments upon benefited property to pay for local improvements. Some of the strongest of the cases above cited are cases relating to such assessments (Mulligan *v.* Smith, 59 Cal., 206; Boorman *v.* Santa Barbara, 65 *Id.*, 313; Hutson *v.* Woodbridge, &c., 79 Cal., 90; Stuart *v.* Palmer, 74 N. Y., 183; State *v.* Road Coms., 41 N. J. L., 83). The case of Stuart *v.* Palmer, *supra*, is a leading one on this subject. In this case Mr. Justice Earl says: "The Legislature can no more arbi-"trarily enforce an assessment for which property may "be taken and sold, than it can render a judgment against "a person without a hearing. It is a rule founded on

* Mulligan *v.* Smith, 59 Cal., 206; Hutson *v.* Woodbridge, &c., 79 *Id.*, 90; Patten *v.* Green, 13 *Id.*, 325; Curran *v.* Shattuck, 24 *Id.*, 427; Ieck *v.* Anderson, 57 *Id.*, 251; Boorman *v.* Santa Barbara, 65 *Id.*, 313; Chicago, &c., Co. *v.* State, 134 U. S., 418; Minneapolis, &c., Co. *v.* State, *Id.*, 467; Powers' Appeal, 29 Mich., 504; Butler *v.* Supervisors, 26 *Id.*, 22; Paul *v.* Detroit, 32 *Id.*, 108; Thomas *v.* Gain, 35 *Id*, 164; Darling *v.* Gunn, 50 Ill., 424; Garvin *v.* Daussman, 114 Ind 429; Lehman *v.* Robinson, 59 Ala., 219; Dickey *v.* Tennison, 27 Mo., 376; State *v.* Road Com., 41 N. J. L., 83; Stuart *v.* Palmer, 74 N. Y., 183; Granger *v.* Buffalo, 6 Abb. N. C., 238; Lumsden *v.* Milwaukee, 8 Wis., 485; Siefert *v.* Brooks, 34 Wis., 447; State *v.* Fond du Lac, 42 *Id.*, 298; Gatch *v.* Des Moines, 63 Iowa, 718; Kuntz *v.* Sumption, 117 Ind., 1; Same case, 19 N. E. Rep., 474; Law *v.* Johnston, 118 Ind., 261; Same case, 20 N. E. Rep., 745; San Mateo Co. *v.* S. P. R. R. Co., 8 Saw., 238; Same case, 13 Fed. Rep., 722; Albany City Nat. Bank *v.* Maher, 20 Blat., 342; and other cases cited in the note to Flint River S. B. Co. *v.* Foster, 48 Am. Dec., 269.

"the first principles of natural justice older than written "constitutions, that a citizen shall not be deprived of "his life, liberty or property without an opportunity to "be heard in defense of his rights, and the constitutional "provision that no person shall be deprived of these with- "out due process of law, has its foundation in this rule. "This provision is a most important guaranty of "personal rights to be found in the Federal or "State Constitution. It is a limitation upon arbi- "trary power, and is a guaranty against arbitrary "legislation. No citizen shall arbitrarily be de- "prived of his life, liberty, or property. This the Legisla- "ture cannot do nor authorize to be done. 'Due process "'of law' is not confined to judicial proceedings, but ex- "tends to every case which may deprive a citizen of life, "liberty, or property, whether the proceeding be judicial, "administrative, or executive in its nature. This great "guaranty is always and everywhere present to protect "the citizen against arbitrary interference." In the same opinion the learned Judge says: "I am of opinion that "the Constitution sanctions no law imposing such an as- "sessment, without notice to, and a hearing or an oppor- "tunity of a hearing by the owners of the property to be "assessed. It is not enough that the owners may by "chance have notice, or that they may as a matter of "favor have a hearing. THE LAW MUST REQUIRE NOTICE "TO THEM, AND GIVE THEM THE RIGHT TO A HEARING AND "AN OPPORTUNITY TO BE HEARD. IT MATTERS NOT, UPON "THE QUESTION OF THE CONSTITUTIONALITY OF SUCH A LAW, "THAT THE ASSESSMENT HAS, IN FACT, BEEN FAIRLY AP- "PORTIONED. THE CONSTITUTIONAL VALIDITY OF LAW IS "TO BE TESTED, NOT BY WHAT HAS BEEN DONE UNDER IT, "BUT WHAT MAY, BY ITS AUTHORITY, BE DONE."

It was suggested in the courts below, in this case, that the power of assessment to pay for a local improvement is a branch of the sovereign power of taxation which may well be exercised summarily and without notice. If this power were a branch of the power of general taxation it

would by no means follow that the Legislature could authorize its exercise without due notice and opportunity to be heard. A State cannot take the property of a citizen without due notice and opportunity to be heard, even under the power of taxation. This has been decided in many cases, but in none of them is it more clearly shown than in San Mateo Co. *v.* S. P. R. R., 8 Saw., 238 ; same case, 13 Fed. Rep., 722.

In that case it was explicitly decided that a statute authorizing the exercise of the power of general taxation must, in order to be valid, provide for due notice to the taxpayer at some stage of the proceedings. Mr. Justice Field said : "There is something repugnant to all notions " of justice in the doctrine that any body of men can be " clothed with the power of finally determining the value of " another's property, according to which it may be taxed, " without affording to him an opportunity of being heard " respecting the correctness of their action. * * * We " cannot assent to any such doctrine. It conflicts with " the great principle which lies at the foundation of all " just government, that no one shall be deprived of his " life, his liberty, or his property, without an opportunity " of being heard against the proceeding. The principle is " as old as Magna Charta, and is embodied in all the State " constitutions, and in the 14th Amendment of the " Federal Constitution. * * * Notice is absolutely " essential to the validity of the proceeding in any case; it " may be given by personal citation; and, in some cases, it " may be given by statute; but given it must be in some " form. * * * WHATEVER THE CHARACTER OF THE " PROCEEDING, WHETHER JUDICIAL OR ADMINISTRATIVE, " SUMMARY OR PROTRACTED; AND WHETHER IT TAKES " PROPERTY DIRECTLY, OR CREATES A CHARGE OR LIABILITY " WHICH MAY BE THE BASIS OF TAKING IT, THE LAW DIRECTING " THE PROCEEDING MUST PROVIDE FOR SOME KIND OF NOTICE, " AND OFFER TO THE OWNER AN OPPORTUNITY TO BE HEARD, OR " THE PROCEEDING WILL WANT THE ESSENTIAL INGREDIENT " OF DUE PROCESS OF LAW. Nothing is more clearly estab- " lished by a weight of authority absolutely overwhelming

"than that notice and opportunity to be heard are indis-
"pensable to the validity of the proceeding."

To the same effect is the opinion of Mr. Circuit Justice Sawyer in the same case, and similar expressions may be found in many other tax cases in our text books on taxation. Statutes providing for tax sales and tax deeds emanate from the general taxing power of a State. But it is familiar law that a statute indirectly depriving taxpayers of "due process of law" by making a tax deed conclusive as to jurisdictional facts, &c., immediately upon its execution or after a specified time is unconstitutional and void: Cooley Tax [2d Ed.], 522; Allen *v.* Morse, 72 Me., 504; McCallister *v.* Cottrille, 24 W. Va., 179, and other cases there cited; Wiggin *v.* Temple 73 Me., 380, 382; Hart *v.* Henderson, 17 Mich., 218; Dingey *v.* Paxton, 60 Miss., 1053-5; Allen *v.* Armstrong, 16 Iowa, 513; Cairo, &c., Co. *v.* Parks, 32 Ark., 145; Bannon *v.* Burnes, 39 Fed. Rep., 892.

But even if the power of taxation for the purposes of general revenue could be exercised summarily and without notice, it would afford no reason for applying the same principle to the power of special assessment, which is here in question. We deny that the power of special assessment is a part of the power of general taxation. It is in some respects like that power, but there is a broad and well-defined distinction between them. The power of assessment involved in this case, as has heretofore been stated is more nearly akin to the power of eminent domain. Certain it is that the power of special assessment cannot be exercised except under a statute providing for due notice and opportunity for a hearing to those assessed. This is established by a multitude of cases, many of which are cited *supra*. It was held by the State Supreme Court in this case that while a statute authorizing an assessment like this must provide for some sort of notice to those assessed, yet that it need not expressly provide for a hearing against the assessment; but that such a provision might be implied into it in order to sustain the statutes and the assessment. The theory upon which this doctrine

is based was that the Constitution is to be read as a part of every statute enacted under it, and that a guaranty of due process where necessary must be deemed incorporated into the statutes even though no express provision for such process is contained in it. To support this conclusion the learned Judge cites Neal *v.* Delaware, 103 U. S., 370; Kentucky R. R. Tax Cases, 115 *Id.*, 334.

A brief examination of this doctrine and of the cases cited to support it, will be proper here. In Neal *v.* Delaware, *supra*, one Neal, a negro, having been indicted for felony in a Delaware court, applied for a removal of his cause to a Federal court on the ground that he was denied due process of law and the equal protection of the laws, because by a provision in the Delaware Constitution in force before the adoption of the 14th Amendment to the Federal Constitution only white persons could serve as jurors, so that he was deprived of the privilege of a trial by jurors of his own race. This Court held otherwise, on the ground that by the adoption of the 14th Amendment to the Federal Constitution the obnoxious provision of the State Constitution was in legal effect amended by striking out the word "white."

In Kentucky Railroad Tax Cases, 115 U. S., 334, Neal *v.* Delaware was referred to merely by way of dictum, but the decision was that the State statute there in question as construed by the State Court as well as by this Court, did, in fact, provide for "due process of law," without the aid of the doctrine of Neal *v.* Delaware.

There is a very wide difference between these cases and the case now before the Court. In Neal *v.* Delaware it was not necessary to imply anything into the State Constitution in order to make it conform to the amendment. The State Constitution already provided for due process of law in the case of white persons. By striking out the word "white," therefore, this provision was unquestionably also extended to negroes.

Furthermore, in Neal *v.* Delaware the question was not whether a provision for due process of law may be implied into a State Constitution or statute after a proceed-

ing has been had under such constitution or statute without such "due process" in order to validate it, but whether such a provision may be implied before the proceeding in order to entitle a party to the benefits of due process in that proceeding. The Kentucky Railroad Tax Cases, *supra*, like Neal *v.* Delaware, stood upon this latter ground.

The case at bar stands upon a different footing. Here it is sought not to strike out of a statute a provision obnoxious to the Federal Constitution, but to imply into it an affirmative provision in order to conform it to the Federal Constitution. And besides, the question is here not whether a provision for "due process of law" shall be incorporated into this statute by implication in order to entitle those assessed to the benefit of such due process before the assessment becomes final, but whether after the assessment has become final a provision for such "due process" may be implied into the statute in order to validate the assessment, although the process was not in fact accorded to those assessed during the assessment proceeding. The assessment here was made and confirmed in the absence of the plaintiffs in error and without, according to them or to any of those assessed, any hearing whatever. The statute did not provide for any adequate hearing. Now, however, after the assessment has been made and has become final, without such a hearing, it is sought to imply into the statute a provision for a hearing in order to sustain the assessment. The object in view is not to give the plaintiffs in error the benefit of due process guaranteed by the Federal Constitution, but to hold them bound without such due process on the ground that as the Constitution guaranteed it to them, the statute must be constructed as impliedly authorizing it.

But apart from these considerations, we submit that if the doctrine laid down by the State Supreme Court on this point is correct, it would be impossible to hold any statute to be unconstitutional on the ground that it denies "due process of law" to persons whose life, liberty or property was affected by it. If a provision for the process can be

implied into a statute which contains no such provision, because the Constitution guarantees it, it may be equally implied even though the statute actually forbids "due process."

Indeed, the doctrine laid down in the opinion is inconsistent in itself. The Court held that it was necessary in order to uphold the constitutionality of this statute that it should provide for notice to those affected by the assessment, but that a provision for a hearing after such notice could be implied into the statute if it does not expressly provide for it. We are at a loss to understand how such a position can possibly be maintained. If the guaranty of due process in the Federal Constitution will warrant a court in implying into a statute a provision for a hearing, why cannot it equally imply into it a provision for notice? The doctrine laid down in the opinion as applied to a case of this sort is utterly unsupported by authority. We venture to affirm that there is no case in the books in which an assessment like this, imposed under a statute not expressly providing for adequate notice and adequate opportunity to be heard by those assessed, where no such notice or opportunity has been in fact accorded, has been upheld on the ground that provision for notice and opportunity should be implied into the statute, because of the constitutional guaranty of due process. The long array of authorities already cited stands as an impregnable barrier in the way of the establishment of such a doctrine.

The rule of strict construction, always applied to statutes authorizing the exercise of a special limited jurisdiction like that here in question, utterly forbids any implication into such a statute of provisions for a notice or a hearing beyond the express terms of the statute. This rule of strict construction is an inflexible and invariable rule. It is applied to such a statute with equal force and stringency, whether the object is to ascertain the construction of the statute or to determine its constitutional validity. That rule applies to the provisions for notice and a hearing contained in such a statute as well as to any of its other pro-

visions. The hearing provided for cannot extend beyond the express provision of the statutes for the purpose of finding upon it a conclusive and binding adjudication. This is especially true where a question as to the extent of the hearing arises after the proceeding has been concluded, as in this case. The adjudication founded upon such a hearing has not the force of a judgment except to the extent that the statute expressly authorizes a hearing. The tribunal in which the hearing is to be had can decide no question except such as it is expressly authorized to hear and decide. This is established by abundant authority (*Re* Lange, 85 N. Y., 307, 310; *Re* Department Public Parks, *Id.*, 463; Mulligan *v.* Smith, 59 Cal., 206, and other cases hereinafter cited.)

In this case, assuming that the express provisions of the statute with respect to the notice and hearing accorded to those assessed be inadequate, even if full notice and a full hearing had been in fact awarded, we insist that adjudication founded thereon could not possibly be held conclusive except to the extent to which the statute expressly authorized the hearing. The rule established by the authorities heretofore cited to the point that such a statute must expressly provide for notice and a hearing, show beyond question that the notice and hearing essential to satisfy the constitutional guaranty of due process must be a notice and hearing awarded as a matter of right, and not granted as a favor. If, under the statute here in question, assuming its provisions for notice and a hearing to be insufficient, if a full notice and a full hearing had in fact been awarded, such notice and hearing would have been a mere matter of grace and favor. It would have been of no more force than any other pretended trial heard without authority of law. An indictment for perjury would not lie for false testimony given upon such a hearing. It would have been like a mock trial in a moot court. It would have been attended by none of the sanctions essential to the hearing implied in the guaranty of "due process of law." A decision founded

upon such a mere voluntary hearing would possess none of the requisites of a legal hearing.

But no hearing was in fact allowed here. It would be monstrous in such a case to hold that those assessed who were thus not allowed a hearing by the statute, and were not awarded a hearing in fact, are, nevertheless, concluded from objecting to the confirmation of the assessment.

2. KIND OF NOTICE AND OPPORTUNITY TO BE HEARD ESSENTIAL TO CONSTITUTE DUE PROCESS UNDER THE STATUTE.

The notice and hearing provided for in any case by statute must be adapted to the nature and the circumstances of that particular case to constitute "due process of law." This is conceded in the opinion of the State Supreme Court, and is both clear in principle and amply supported by authorities (Davidson *v.* New Orleans, 96 U. S., 97 and 107; Hagar *v.* Reclamation Dist., 111 *Id.*, 708; San Mateo Co. *v.* S. P. R. R., 13 Fed. Rep., 722; Cook *v.* Gregg, 46 N. Y., 442; Happy *v.* Mosher, 48 *Id.*, 317).

As was said by Mr. Justice Bradley, in Davidson *v.* New Orleans, 96 U. S., 97 and 107: "In judging what is "'due process of law' respect must be had to the cause and "object of the taking, whether under the taxing power, "the power of eminent domain, or the power of assess-"ment for local improvement, or none of these." Mr. Justice Field states the rule for measuring the sufficiency of the notice and opportunity for a hearing provided for and awarded in any case, in very clear and apt terms in San Mateo Co. *v.* S. P. R. R., 13 Fed. Rep., 751, where he says, in construing the requirement of due process in the 14th Amendment to the Federal Constitution: "And by "due process is meant one which, following the forms of "law, is appropriate to the case, and just to the parties "to be affected. It must be pursued in the ordinary "mode prescribed by the law; it must be adapted to the "end to be attained; and it must give to the party to be "affected an opportunity of being heard respecting the jus-

" tice of the judgment sought." The notice must be of a kind " by which it is reasonably probable that the party " proceeded against will be apprised of what is going on " against him, and an opportunity is afforded to defend." Happy *v.* Mosher, 48 *Id.*, 317; Cook *v.* Gregg, 46 N. Y., 442; both relied on as authorities against us in the Court below.

Although within proper limits the Legislature may prescribe the time of notice and the opportunity for a hearing to be accorded in any particular class of cases the requirements of the statute, in that regard, must be complied with (Stuart *v.* Palmer, 74 N. Y., 188; San Mateo Co. *v.* S. P. R. R. Co., 13 Fed. Rep., 722).

It by no means follows that the Legislature can make any kind of opportunity of notice to be heard due process by declaring it to be so when it is not so in fact (Murray's Lessee *v.* Hoboken, &c., Co., 18 How. (U. S.), 272, 276; Davidson *v.* New Orleans, 96 U. S., 107).

As said by Mr. Justice Curtis in the first of the two cases last cited: " It is manifest that *it was not left to the* " *legislative power to enact any process which might be de-* " *vised.* * * * We must examine the Constitution it- " self, to see whether this process be in conflict with any of " its provisions. If not found to be so, we must look to " those settled usages and modes of proceeding existing in " the common and statute law of England, before the emi- " gration of our ancestors," &c. The power of the Legislature in this respect is subject, as already stated, to the same limitation as that of other branches of the government, the constitutional requirement of due process applying to it with the same force as to the other branches (Westervelt *v.* Gregg, 2 Kern., 209, and other cases above cited).

The notice prescribed by statute in any proceeding for the taking of property, or for fastening a lien or charge thereon, in order to constitute due process should, if practicable, be personal, actual notice; and constructive notice by publication or otherwise should be resorted to

only when, from the multitude of those concerned, or other causes, personal notice is practically impossible (2 Am. Lead. Cas., 655; Wells Juris. Sec. 82; Neff *vs.* Pennoyer, 3 Sawy., 301; Bowler *v.* Huston, 30 Grat., 273; Brewster *v.* Newark, 11 N. J. Eq., 118; State *v.* Fond du Lac, 42 Wis., 289; Kundinger *v.* Saginaw, 59 Mich., 355).

The presumption of absolute uncontrollable verity attaching from judgments arose from the fact that, at common law, the defendant was always personally brought into court and was actually present when judgment was rendered (Neff *vs.* Pennoyer, 3 Sawy., 301).

In that case it was said: "The cornerstone of a pro-"ceeding at common law was that no judgment could be "given against a defendant unless he appeared in the ac-"tion. Out of this important fact grew the reasonable "presumption that the record was absolutely true and the "Court had jurisdiction to give the judgment. But the "law ceases with the reason of it. There is no reason for "such a presumption when the proceeding takes place in "the absence of the defendant upon a mere constructive "service of process upon him. In such cases the record "must show affirmatively every fact necessary to give the "Court jurisdiction, and as to such facts it may be even "contradicted, when attacked collaterally in the tribunal "of another forum."

As was aptly said by Chancellor Williamson in Brewster *v.* Newark, 11 N. J. Eq., 118, a case of assessment for benefit: "A publication in a public newspaper is but "little better than the notice which Caligula prescribed "for his laws."

The notice provided for being process designed to give jurisdiction of the parties to the particular proceeding, should, like other process, be directed or run to those parties, in some mode, so as to be reasonably likely to attract their attention, especially where it is constructive notice by publication or otherwise (Boorman *v.* Santa Barbara, 65 Cal., 313; Webster *v.* Reid, 11 How. U. S., 460). It must be so directed that those who are

intended to be reached by it may have reasonable means of knowing therefrom that they are the parties intended.

The notice must also, to constitute due process, be notice of a hearing before some officer or tribunal competent to determine the matter to be heard upon its merits, and to administer complete relief, and must in some more or less direct mode appoint a time and place for such hearing (State *v.* Perth Amboy, 29 N. J. L., 259, 261-2; State *v.* Plainfield, 38 *Id.*, 96; State *v.* Bayonne, 49 N. J. L., 311; Cooley Const. Lim. (4th Ed.), 103).

And the notice must precede the fixing of the liability. It must be required at all events to be given at some stage of the proceeding before the liability has been finally and irrevocably established. It is obvious that notice after the fact, or even after a *prima facie* case has been made against the party notified, as, for instance, a notice to appear after the liability has been adjudged to settle some mere matter of detail as to the entry of judgment, the allowance of cost, or the like, would be a bold travesty of due process (State *v.* Road Com., 41 N. J. L., 89; Albany City Nat. Bank *v.* Maher, 20 Blatch., 341).

It is conceded in the opinion of the State Supreme Court that the opportunity for a hearing provided for in this statute would not be sufficient in an ordinary judicial proceeding. "Measured by that standard," says the opinion, "it would unquestionably be deemed insufficient." But the Court further say that this cannot be accepted as the true rule. Why not? Why should there be a less ample opportunity for a hearing accorded under this statute than what would be deemed necessary in an ordinary judicial proceeding? There was no great public necessity calling for this improvement. This is conceded even by the learned Judge who delivered the opinion of the State Supreme Court. He says that the municipality and the general public "were obviously so little interested "in the matter that it would hardly be putting it too "strong to say that there was no decent pretense for the "improvements, except upon the hypothesis that "the local property holders assessed would be ad-

"vantaged by it." (Record, p. 337, fol. 1011.) If so, then there was certainly no such urgent public need for the improvement as to require it to be hastened through without giving those who were to pay the cost of it an ample opportunity to be heard upon all questions affecting their rights. No hardship whatever could result from the delay incident to a protracted and careful trial. No public interest could suffer, nor would any private interest be injuriously affected by any such proceeding. The district affected was small. A very short time would have sufficed to notify the owner or lessee of every lot and subdivision of a lot in the district of that proceeding. And the number of owners was not so large as to make it impossible or even difficult to hear them.

The sufficiency of the notice and opportunity for hearing provided by a statute in any case, must be measured by the conclusiveness of the adjudication to be founded upon it. Very scant and summary notice and opportunity for a hearing might well be deemed adequate if the adjudication intended to be based thereon were designed to be left open to collateral attack; but where it is intended that the adjudication shall be attended by the presumption of absolute uncontrollable verity attaching to common law judgments, nothing short of strict common law personal notice can, upon principle, be admitted to be the due process guaranteed by the great charter of English liberties, and by our American constitutions. This is well shown in Neff *v.* Pennoyer, 3 Sawy., 301, and other cases above cited.

It is insisted that this confirmed assessment is as conclusive as a common law judgment. The State Supreme Court indulged, in favor of it, all of the presumptions and intendments that could have been invoked in favor of an ordinary judgment.

Upon what conceivable principle can it be held that those assessed were not entitled to the opportunity for a hearing, essential in an ordinary proceeding before pronouncing judgment, if the judgment rendered against

them in confirming that assessment is to be attended by all the presumptions of absolute uncontrollable verity attaching to a judgment in an ordinary legal proceeding? If the plaintiffs in error and others assessed for this improvement were not entitled to the opportunity for a hearing which is essential in an ordinary judicial proceeding, then certainly they ought to be held as conclusively bound by the judgment rendered against them as they would be by an ordinary judgment. They certainly cannot be held bound further than they had an opportunity for a hearing. The less ample the opportunity for a hearing accorded them by the statute, the less conclusive should be the judgment founded upon that hearing.

The theory of the State Supreme Court that those assessed under this statute were not constitutionally entitled to the same opportunity for a hearing that would be deemed necessary in an ordinary judicial proceeding is founded upon the erroneous conclusion of the Court that the power of special assessment here under consideration is a branch of the power of taxation, and that the opportunity for a hearing accorded under a general tax law is, therefore, necessarily sufficient under a statute imposing a special assessment like this.

The summary and scant notice held sufficient in many cases under a general tax law is so held because of the necessity of celerity and promptitude in the assessment and collection of public revenue. This is clearly pointed out in San Mateo Co. *v.* S. P. R. R. Co., 8 Sawy., 238; Same case, 13 Fed. Rep., 722; Hagar *v.* Reclamation Dist., 111 U. S., 708, and Ky. R. R. Tax Cases, 115 *Id.*, 331.

As stated by Mr. Justice Field in San Mateo Co. *v.* S. P. R. R. Co. (*supra*): "The necessities of revenue for the sup-
" port of the Government will not admit of the delays
" attendant upon judicial proceedings in courts of chan-
" cery," nor personal citation to the taxpayer. In such a case the statute itself, without other notice, might be deemed sufficient warning to the taxpayer (Ky. R. R. Tax Cases, 115 U. S., 331).

But as we have shown, there was no urgent private necessity in this case to preclude full notice and a full hearing. None of the reasons which have been held to justify scant and summary notice under a general tax law apply here. Hence, the rule applied under a general tax law to measure the sufficiency of the opportunity for a hearing thereby accorded clearly ought not to apply to this statute. The reason of the rule ceasing, the rule itself should cease.

The distinction between an ordinary tax and an extraordinary assessment like this with respect to the opportunity for a hearing which should be accorded to those taxed or assessed has been recognized from the earliest times. The English cases illustrate this distinction very forcibly. It was long ago established in England that a decree of sewer commissioners, which is strictly an assessment for benefits was examinable and impeachable collaterally in the Superior Court of law for want of due notice or opportuity to be heard and for defects in the hearing and adjudication amounting to a denial of "due process of law." (Bow *vs.* Smith, 9 Mod. 94; Neave *vs.* Weather, 4 Ad. & El. (N. S.) 1072; Rooke's Case 5 Co. 100 (a); Keighley's Case, 10 *Id.* 130, (6) note E: Inst. 276; 2 Bac. Ab. 787: Com. Dig. Sewers, C. D. G. H.; Rex *vs.* Justices, 3 Burr. 1530; 4 Bac. Ab. 6812, Highways, G. Murray *vs.* Hoboken, 18 How. [U. S.] 276.)

These authorities relating to the decrees of sewer commissioners show that if the opportunity for a hearing accorded before pronouncing such a decree was less than that accorded in an ordinary judicial proceeding, the decree was, by so much, less conclusive than an ordinary judgment. They are utterly irreconcilible with the doctrine laid down in the opinion of the Supreme Court in this case, that although those assessed for an improvement of this sort are not entitled to the same opportunity for a hearing as would be essential in an ordinary proceeding the judgment confirming the assessment against them is nevertheless as conclusive as an ordinary judgment.

3. INSUFFICIENCY OF NOTICE PRESCRIBED BY SEC. 7, WHICH WAS THE ONLY SEMBLANCE OF A NOTICE OF A HEARING.

The only notice provided for in the Dupont Street Act which can possibly be claimed to constitute even the semblance of process to those assessed is that prescribed in Sec. 7. It is simply notice of the filing of the report of the commissioners for inspection after its completion. The section provides that the report, when completed, shall be left at the office of the board for inspection for thirty days, and that "notice that the same is so open for inspec-"tion for such time and at such place shall be published "by said board daily for twenty days in two daily news-"papers printed and published in said city."

The provision for notice is clearly insufficient in the first place, because it was not expressly required to be addressed to those whom it was intended to warn, or to anybody.

We have already shown that if we are warranted in implying any provisions into this statute which it does not contain in terms, it certainly should be implied that this vitally important notice was required to be addressed to those assessed, and yet that it was not so addressed.

There is no word in the statute itself requiring the notice to be addressed to any one. Unless such requirement can be implied, the want of it seems to us absolutely fatal. How can an advertisement in a newspaper addressed to no one be deemed sufficient notice to confer upon any tribunal jurisdiction to fasten an assessment like this upon private properey which should be a burden upon it for twenty years? In principle it seems to us that a notice addressed to nobody is no notice at all. An owner of property ought certainly not to be held bound to read every advertisement in the newspapers which is not addressed to somebody else in order to see whether or not it is a notice preliminary to an assessment or a charge upon his property; but this is precisely the duty that is imposed upon every property owner if an unaddressed advertise-

ment in the newspapers is good notice in law to warrant the imposition of such an assessment as this.

In Webster *v.* Reid, 11 How. (U. S.), 460, it appeared that a statute had been passed for partitioning certain lands called half-breed lands in a certain county, and for adjusting the fees of the commissioners making the partition, and providing that their fees, when adjusted, should be liens upon the lands. The only notice provided for in the statute was a notice required to be published for a certain time, directed to the owners of the half-breed lands "lying in Lee County." The lands having been sold under the judgment rendered under this statute for fees, &c., ejectment was thereafter brought for the lands. In that action the judgments were held to be mere nullities on the ground of insufficiency of notice provided for in the statute and no notice actually awarded; although the case did not go entirely upon the ground of insufficiency of the direction or address in the required notice.

Another case more directly in point is Boorman *v.* Santa Barbara, 65 Cal., 313.

That was a case arising under a statute providing for the opening of a certain street on petition of a majority of the owners of lots fronting thereon. The statute required the commissioners having charge of the matter to give notice of the time and place when they would proceed to examine the property affected by the improvement "by an advertisement" published in a newspaper for a certain time. The statute did not require the notice to be addressed to anybody, and the notice published was not so addressed or directed. It was held insufficient to give the commissioners jurisdiction, and the proceeding was held void and the statute unconstitutional in not providing for due process. The Court said: "No notice at all addressed "to any particular person or class of persons, or which "would inform any particular person that, on failure of "appearance, any burden would be imposed upon him, or "his property."

It was held, however, in the opinion of the State Supreme Court in this case, that Boorman *v.* Santa Barbara

(*supra*), is not an authority in point here, because the statute under consideration in that case, unlike the Dupont Street Act, did not fix the limits of the assessment district; and because as the act here did fix the limits of the assessment district, the parties assessed by reading the act in connection with the notice were informed that it was addressed to them, as thoroughly as if it had been directed to them by name. We insist that the attempted distinction between the case of Boorman *v.* Santa Barbara (*supra*), and the case at bar is entirely untenable.

In the first place, the Dupont Street Act did not absolutely fix the limits of the assessment district. In Section 3, it is true, a description by boundaries is given of two "benefited" districts, one extending from Market street to Bush street; the other from Bush street to Filbert street. But in Section 12 it was provided that the assessment should extend over the first of these districts unless protested against by a majority of property owners in thirty days, but that it should not extend over the other district unless petitioned for by a majority, &c.

Thus, an owner of property in either of these districts, even if he had read the act and seen the unaddressed notice published under Section 7, would not then have known whether the notice was addressed to him or not. He would need, not only to see the notice and to have read the statute, but also to have seen the protest or petition filed under Section 12 in order to be sure whether the notice applied to him or not.

As a matter of fact, too, since no petition was filed by the property owners north of Bush street, and the assessment was not extended north of that street, the statute does not correctly define the assessment district. Only about half of the assessment district described in the statute is really covered by the assessment. Hence, even if it should be held that the notice, reading the statute as part of it, was notice to all the property owners in the assessment district, defined in the statute, it was not a notice simply to those assessed. It was addressed to quite as many persons who had no interest in it as to persons who

were interested. Reading the statute as part of the notice, in accordance with the theory of State Supreme Court, the notice is, therefore, false and misleading.

But even if the statute accurately defined the assessment district, and should be deemed part of the notice, we maintain that this fact would not obviate the want of a provision for an address in the notice. The object of an address or direction in a legal notice is to call the attention of the party to whom it is addressed. It is to inform him before he reads it that it concerns him so that he may read it. An unaddressed notice would certainly not be any the more readily seen because the statute was deemed part of it than if it had no connection with the statute. The theory that the want of an address in such a notice is supplied by reading the statute as part of it, because the statute will show for whom it is intended, is indeed novel, not to say unique. It is like the bashful servant girl's notion that she need not put her lover's name on the back of her letter to him because the name was inside the letter.

Again, the provision for notice in Section 7 is insufficient because the notice was not notice of any pending or future proceeding, and pointed to no tribunal, time, or place for a hearing. A notice to constitute process for the purpose of bringing any person within the jurisdiction of a tribunal must be a notice of a hearing in that tribunal. This is implied, indeed in the very term "process" as defined in the books. This is defined by Wharton quoting from Britton, as "the summons by which one is cited into "a court, because it is the beginning or principal part "thereof by which the rest is directed."

A notice essential to confer jurisdiction upon any tribunal in any proceeding must point the party to whom it is addressed to the tribunal in which, and to the time when, and to the place where, he may be heard in that proceeding (State *v.* Perth Amboy, 29 N. J. L., 259, 261, 262; State *v.* Plainfield, 38 *Id.*, 96; State *v.* Bayonne, 49 N. J. L., 311; San Mateo Co. *v.* S. P. R. R. Co., 8 Sawy., 238; Same Case, 13 Fed. Rep., 722; Cooley Const. Lim., 4th Ed., 753).

In State *v.* Plainfield, 38 N. J. L., 96, under a statute providing for ten days' notice by publication of the intended adoption by a municipal council of an ordinance declaring the expediency of a public improvement, a notice was published stating that such an ordinance had been introduced in the council and ordered to a third reading, and that it was the intention of the council to adopt the same. This notice was held not sufficient to constitute due process of law, because it did not state when the council would consider the ordinance. The Court said: "The notice is defective in not stating when the ordinance "will be considered by the council, so that the parties in-"terested may be heard, if they desire."

Then, after showing that the adoption of such an ordinance is a judicial and not a legislative act, the Court further says: "It is fundamental law that no man shall "be deprived of his rights, either of person or property, "without an opportunity of being heard. He cannot be "heard unless he have a reasonable notice of the time "when, and the place where, his rights are to be adjudged. "(Hall *v.* Turnpike Co., 2 Harr., 337; State *v.* Newark, 1 "Dutch. 411; Hess *v.* Cole, 3 Zab., 124; State *v.* Jersey City, "4 *Id.*, 662). * * * *

"It is, therefore, not put upon the land owner to see cer-"tain members of council, or all of them, unofficially, and "state his case, nor is he required to seek, by inquiry of "the city officers, or others, when and where they will meet "officially to determine his rights. It is his right to be "informed, either by actual or constructive notice, as the "charter shall provide, of the time and place appointed "for the meeting of council to consider their proposed "action."

Mr. Justice Cooley, in discussing the question of the rights of property owners affected thereby to an opportunity to be heard in a proceeding for assessing the compensation to be paid for property taken under the power of eminent domain, after stating that the Legislature cannot fix the compensation, says: "And, if a jury is pro-"vided, the party must have the ordinary opportunity to

"appear when it is to be impanelled, that he may make "any legal objections. And he has the same right to no- "tice of the time and place of assessment that he would "have in any other case of judicial proceeedings, and the "assessment will be invalid if no such notice is given" (Cooley Const. Lim., 4th Ed., 704 [*563]).

And if the notice provided for or awarded in a proceeding for taking or charging property not only appoints no time or place for a hearing, but indicates no opportunity for a hearing whatever, it is still defective as process, as shown in San Mateo Co. *v.* Southern P. R. Co., 8 Sawy., 238; same case, 13 Fed Rep., 722.

The notice provided for in Section 7 is more glaringly defective in the particulars here mentioned than in any of the cases above cited. It was, as we have seen, simply required to be notice that the report was on file and open for inspection in the office of the Board of Dupont Street Commissioners. Standing alone, this notice was not sufficient to raise even a suspicion in the mind of any property owner interested that it was intended as "process" to bring him before any tribunal whatever, or that it was designed to afford him an opportunity to be heard upon any subject, before any tribunal, at any time or place whatever. The only tribunal required to be mentioned in the notice was the Board of Commissioners, but that body would afford him no hearing. Its labors were over. If a taxpayer appeared at its office, and did the only thing which the notice purported to give him an opportunity to do, by "inspecting" the report from end to end, it would not point him to any hearing or tribunal, time or place therefor.

Even if the statute be read as part of the notice provided for, the notice is still not "process" and points to no opportunity for a hearing in any tribunal, at any time or place whatever. The only semblance of a hearing mentioned in the statute is that provided for in Section 8, which will hereafter be shown to have been utterly lacking, in every essential, "due process."

Another defect in this provision for notice is that the

notice was not expressly required to be served, that is to say, completely published before the period allowed for filing petitions under Sec. 8 began to run. Unless the statute can be construed as impliedly so providing it certainly did not award "due process" to those affected by it. The only requirement respecting the publication of this notice is that it was to be published "daily for twenty days." It is not stated when the publication was to be made. The board might have published it at any time or during or after the thirty days allowed for filing petitions. Will it be pretended that the notice would have been sufficient if published during the last twenty of the thirty days allowed for such filing, or after the expiration of the thirty days? Assuredly not. Such a notice would have been like a service of summons after judgment.

This, we submit, was a fatal defect in the provision for notice. The fact that the notice was not published during the last twenty of the thirty days or after the expiration thereof does not make the defect any the less fatal. The constitutionality of a statute with respect to providing for "due process" to those affected depends upon what may be done under such statute and not upon what is in fact done under it (Stuart *v.* Palmer, 74 N. Y., 183). The unconstitutionality of a statute authorizing a charge upon property in failing to provide for "due process of law" to the owners of such property cannot, as we have seen, be healed by a voluntary award of "due process" under it by those intrusted with its execution, as a matter of grace or favor.

But it was held in the State Supreme Court in effect that the statute required the notice to be published during the first twenty days of the thirty days allowed for "inspection" and for filing petitions, because it declared that the notice should show that the report "is so open for inspection." To this we answer that this language of the act would have been as well satisfied by publishing the notice during the last twenty days of the thirty days as by publishing it during the first twenty days.

The suggestion in the opinion of the State Supreme

Court that a statute providing for publication of summons requiring the defendant to appear and answer on or before the last day of publication would be unobjectionable if it afforded him "a reasonable opportunity to be heard," is probably true enough, but it has no application here. This statute provided for the filing of petitions at any time during the thirty days allowed for the inspection of the report, and for setting down each petition for a hearing "within ten days after the date" of its filing. And it is claimed that other property owners were, by an advertisement published during the first twenty of those thirty days, put upon notice of every such petition and afforded a reasonable opportunity to be heard against it. This is not requiring a party to appear and answer on or before the last day of publication of notice; it is requiring him to appear and answer on the first day if a petition should be then filed and set for hearing, or to appear and answer before the notice has been published at all, assuming that property owners should answer such a petition, which we deny.

4. STATUTE CANNOT BE DEEMED PART OF NOTICE PROVIDED FOR IN SEC. 7 FOR PURPOSE OF MAKING PROVISION THEREFOR SUFFICIENT, AND IF SO, IT WOULD NOT CURE DEFECTS ABOVE-MENTIONED.

It is in effect conceded by the State Supreme Court that the provision for notice in Sec. 7 of the Dupont Street Act is wholly insufficient, unless the statute is to be regarded as part of the notice; but it is claimed that the statute should be so regarded upon the theory that those affected by it being "presumed to know the law," must be deemed to have known its contents. We deny this presumption.

That presumption, that all men know the law, does not extend to a mere private and local statute, like the Dupont Street Act, but only to public and general statutes (Lawson Presump. Ev., 14; Cook *v.* Sumner, &c., Co., 1 Sneed,

716; King *v.* Doolittle, 1 Head, 85; Whiting *v.* Townsend, 57 Cal., 515).

And, furthermore, it is manifest that this presumption does not apply to unconstitutional statutes, whether public and general or private or local. An unconstitutional statute being utterly void, is not a law at all. It has the form of a law without its substance. It is no more a law than a pretended enactment of a mock legislature. And manifestly the above-mentioned presumption of knowledge does not extend to what is not a law.

In this case we maintain that the act in question is unconstitutional and therefore not a law. Its constitutionality is one of the principal issues in the case. Until its constitutionality is established the above mentioned presumption cannot be extended to it. Here, however, the presumption is sought to be made so as to prove its constitutionality. It is claimed that because this statute is a law, those assessed under it must be presumed to have known its contents, and that because they are presumed to have known its contents it afforded them "due process" and is constitutional, and therefore a law. Or, to reduce the argument to its lowest terms, it is contended that because this statute is a law, those assessed under it must be presumed to have known its contents, and because they are presumed to have known its contents it is therefore a law. This is an obvious *petitio principii.* It is "reasoning in a circle" of the most glaring kind.

Besides, we submit that the legal fiction that "all men are presumed to know the law," can never be resorted to for the purpose of eking out an insufficient notice so as to constitute it "due process of law" in a proceeding to impose an extraordinary charge on private property under a special local statute like this. If it could be the right to "due process" would itself become a mere fiction, a name and not a thing, *nomen et præterea nihil.* It could be frittered away to nothing. There is no reason indeed, upon such a theory, why the special statute itself might not be deemed sufficient notice to constitute "due process"

without any other notice whatever. Such a doctrine cannot be maintained.

But even if the Dupont Street Act is to be read as part of the notice provided for in Section 7 for the purpose of supplying deficiencies in that notice upon the ground of a presumption of knowledge of its contents, or otherwise, we insist that it will not have the effect to cure the defects in the notice which have already been pointed out. It has already been shown, indeed, that regarding the statute as part of the notice, it would not have the slightest effect in supplying the absence of any address or direction in the notice. So that, even if the statute be read as part of the notice, the notice still fails to point to any hearing or any time or place therefor. The only hearing provided for in the act is that mentioned in Section 8 to be held in the County Court upon the filing of a petition by an "aggrieved" property owner. Inasmuch as the statute left it entirely to the volition of the petitioners as to when they would file a petition, and as it was entirely voluntary with the Court when the petition should be set down for a hearing within ten days after such filing, it is clear that a notice published under Section 7, even if coupled with a provision for a hearing, would not indicate the time or place of such hearing.

A notice of an opportunity for a hearing which leaves the time of such hearing dependent entirely upon the option or caprice of other parties, is certainly not sufficient to constitute "process" at all, much less "due process." Here, regarding the statute as part of the notice, any property owner interested reading the notice, who did not desire to file a petition himself, might be compelled to wait through the entire thirty days before being accorded an opportunity to be heard against the modification of the assessment. And assuming that the statute allowed property owners to contest a petition by the board for the confirmation of the assessment, the time for the hearing of such petition was still more vague. The board was not required to file its petition for confirmation at any particular time, nor was the County Court required to hear and

act upon such petition at any particular time after the filing. The only requirement with respect to the filing of such a petition by a board is that it shall be filed in case no petition by an aggrieved taxpayer is filed within thirty days. Hence such a petition by a board could not be filed until after the expiration of the thirty days allowed for filing petitions by taxpayers. But, as the statute did not limit the time within which the board should file such petition after the expiration of the thirty days, it might be continued indefinitely. The board might file a petition the next day after the expiration of the thirty days' period, or it might wait for weeks or months or even years.

On another ground also we insist that the reading of the statute as part of the notice provided for in Section 7, does not cure the defects in the notice so provided for. If, as is contended, this notice was process, whose office it was to bring those assessed into the County Court, and to confer upon that Court jurisdiction over this proceeding, certainly the effect of complete service of the notice should have been to invest that Court with complete jurisdiction. As a matter of fact, however, when we come to read the statute in connection with the notice, we find that notwithstanding the complete publication of the notice, the County Court might still have no jurisdiction whatever over this assessment or over the parties to it. The statute did not provide for the institution of any proceeding in the County Court before, during or after publication of the notice. It simply left it to the option of property owners affected by the assessment, as we have seen, to file petitions under Section 8, at any time within the thirty days allowed for the inspection of the report. Now, suppose no such petition had been filed in the County Court at the close of the period prescribed for publication of the notice, how could it possibly be claimed that the County Court became invested with jurisdiction over the proceeding by such publication? There would have been no proceeding in that Court. The report of the assessment was not on file there. The County Court, indeed, would have

been an entire stranger to the whole proceeding. This being so, it seems to us that the notice, even assuming the statute to be part of it, cannot possibly be regarded as process for the purpose of bringing those assessed within the jurisdiction of that Court or of any other. It was not process at all.

The framers of this act themselves, clearly did not regard the notice prescribed by Section 7 as constituting process, for the purpose of bringing anybody into the County Court to answer a petition filed by an aggrieved taxpayer. The act provides that upon the filing of such a petition, a copy of it shall be served upon some member of the Board of Commissioners. (See Section 8.) This service of a copy of the petition was certainly designed to be process for the purpose of bringing the Commissioners into Court to answer the petition. Now, if the publication of the notice prescribed by Section 7, constituted service of process for the purpose of investing the County Court with complete jurisdiction over the entire assessment, and over all the parties to it, it must also have had the effect of bringing the Commissioners into Court. There would have been no necessity for a provision for the service of a petition upon the Board of Commissioners, or upon anyone else in that view of the matter. The provision for service upon the Commissioners is a clear indication therefore, that the makers of the statute did not regard the publication of the notice prescribed by Section 7 as process, for the purpose of conferring jurisdiction upon the County Court.

It is obvious also that reading the statute as part of the notice does not tend in the slightest degree to remedy the defect in the provision for notice in not prescribing the time when the publication of notice shall be made, with reference to the filing of the report. Indeed when we read the statute as part of the notice, it makes this defect the more apparent.

So, too, reading the statute as part of the notice only serves to emphasize the objection that, if the notice is process at all, it is process emanating from one tribunal

and returnable to it for the purpose of conferring jurisdiction upon another distinct tribunal. The notice was required to be published by the Board of Commissioners. It was their duty to see that the publication continued for the required time. The contents of the notice related to the doings of the commissioners. It was simply a notice that the report of the commissioners was on file in their office. On the other hand, the only hearing provided for in the act was a hearing in the County Court. Thus we are required to believe that a notice of the filing of an official document in the office of one tribunal is "process" for the purpose of investing another tribunal with jurisdiction over the matter to which that document relates.

5. HEARING PROVIDED FOR WAS ONLY QUESTION OF ORDERING REPORT AND CERTAIN DOCUMENTS AND DATA TO BE FILED, AND NOT UPON THE MERITS, AND AS THE PROVISIONS THEREFOR CANNOT BE EXTENDED BY IMPLICATION IN THIS CASE, IT WAS INSUFFICIENT TO CONSTITUTE "DUE PROCESS OF LAW."

The only hearing provided anywhere in the statute is as we have said, that mentioned in Section 8. That section provides that: "Any person interested * * * "*feeling himself aggrieved by the action* or determination "of the said board as shown in said report, may, at any "time within the thirty days mentioned in Section 7 of "this act, apply by petition to the County Court of the City "and County of San Francisco, setting forth his interest "in the proceedings had before said board, and his objec-"tions thereto, *for an order on said board requiring it to* "*file with said Court the report of said board, and such* "*other documents or data as may be pertinent thereto in* "*the custody of said board and used by it in preparing said* "report. Said Court is hereby authorized and empowered "to *hear said petition* and shall *set the same down for a* "*hearing within ten days from the date of the filing* "thereof; and the party filing said petition shall, on the "day he files the same, *serve a copy thereof upon at least*

" *one of the members of the Board of Commissioners ;* and " said board may appear by counsel or otherwise, before " said Court, in response to said petition. Said board may " file a written answer to said petition with said Court. " Testimony may be taken by said Court *upon said* " *hearing,* and the process of the Court may be used " to compel the attendance of witnesses and the pro- " duction of books or papers or maps in the custody " of said board or otherwise. *It shall be in the* " *discretion of said Court, after hearing and* " *considering said application, to allow said order* " *or deny the same ;* and, if granted, a copy there- " of shall be served on said board and it shall proceed to " obey the same according to the terms of the order to be " prescribed by the Court." There is no other provision in that section, or elsewhere, for any further hearing than is here indicated. The section goes on to provide that in case no petition is filed by any aggrieved taxpayer within the time mentioned, "the said report shall be pre- " sented by the said board to the said County Court" with a petition to the Court for its approval and confirmation; and that " *the Court shall have power to approve and con-* " *firm said report, or refer the same back to said board* with " directions to alter or modify the same in the particulars " specified by the Court in the order referring the same back, " and thereupon the said board shall proceed to make the " alterations and modifications specified in the order of said " Court. The alterations and modifications aforesaid being " made, the report shall be again submitted to the said " Court, and if the Court upon examination shall find that " the alterations and modifications have been made accord- " ing to the directions contained in said order, the said " Court *shall approve and confirm the same by an order* to " to be entered on its minutes; but if the said board shall " have neglected or failed to make the alterations and " modifications set forth on the order of reference, the " Court may again refer the report back to said board, " and so on, *until its original order of alterations and* " *modifications* shall have been complied with by said

"board, *and the said Court shall then approve and con-*
"*firm the said report.*"

We insist that the opportunity for a hearing thus provided for was utterly inadequate to satisfy the guaranty of "due process of law." We maintain also that however inadequate it may be, no clause or word can be implied into this statute beyond its express terms, for the purpose of making the hearing more ample. The rule of strict construction, we insist, is to be inflexibly applied to this statute upon this point, especially in view of the fact that no hearing was really had. The express letter of the statute is the only permissible guide to its interpretation.

The only hearing provided for, is a hearing simply upon the question whether the Court shall grant or refuse an order requiring the board to file in court its report, together with certain documents and data used in preparing it. There is not a word in the entire section, or indeed in any other section of the statute, indicating that it was the intent of the law makers that there should be any hearing whatever upon the question of the modification or confirmation of the report. The language of the section is too explicit to be mistaken. It is explicitly provided that the petition of an "aggrieved" taxpayer shall apply for an order for the filing in court of the report of the board with the documents and data mentioned. It is then provided that the Court shall hear "said petition," and shall set it for hearing within ten days from the date of filing. After providing for service of the petition upon the board, the said board is empowered to appear by counsel or otherwise, "in response to said pe-
"tition." It is authorized also to file a "written answer
"to said petition." The provision is made for taking testimony "upon said hearing." Finally the Court is invested with discretion "after hearing and considering
"said application to allow *said order or deny the same.*"
Then it is further provided that if the order is granted a copy of it shall be served upon the board, and that the board shall proceed to obey it according to its terms. Here the hearing, and the relief to be awarded upon it, termi-

nate. There is not a word in the statute or elsewhere to show that there was to be any other hearing upon any other question.

We proceed now to show more specifically some of the defects in the opportunity for hearing thus awarded.

In the first place, the hearing provided for was simply revisory or appellate. It was a hearing after the liability of those assessed had become at least *prima facie* fixed. It was a hearing in which those who desired to prevent the assessment from becoming conclusive were compelled to assume the *onus*. If they did nothing the report was certain to be confirmed and to become final. This is so, even if we concede that the hearing provided for extended down to the confirmation of the report. More especially is it so, if, as the language of the statute explicitly declares, the hearing was to be simply upon the question whether or not the report and the documents and data mentioned were to be filed in court.

We submit that the provision for a hearing of this sort, after the liability has been *prima facie* established upon a mere matter of detail, cannot constitute the opportunity for a hearing implied in the guaranty of the due process. The cases of State *v.* Road Com., 41 N. J. L., 89, and Albany, &c., Bank *v.* Maher, 20 Blatch., 341, are express authorities to support our position on this point.

In Albany, &c., Bank *v.* Maher (20 Blatchf., 341), a statute had been passed to validate a tax previously assessed upon shares of stock in certain banks. The statute provided that within a certain period, therein prescribed, those affected by the assessment, might have it reviewed on *certiorari* to determine whether or not the assessment imposed upon said stock was higher than that imposed upon other property. Such a hearing upon a matter of detail, after the assessment, in which the *onus* was cast upon those resisting the assessment, was held insufficient to constitute "due process of law."

In State *v.* Road Com., 41 N. J. L., 89, a statute authorizing an assessment of compensation for a certain public improvement was held not to award due process to those

affected thereby, because the only hearing provided for was a hearing in the Court of Common Pleas after the completion of the assessment, upon the question of its confirmation. The hearing there provided for was as in this case a limited right of review, but it was far less restricted than the hearing allowed in the statute here in question. Mr. Justice Depew, delivering the opinion in that case, after stating that those affected by such an assessment are entitled to notice and an opportunity to be heard upon questions of law or fact relating to their liability, &c., said: "It is not a compliance with this legal "principle that the prosecutors (those assessed in that "case) had notice of the hearing before the Court on the "application for the confirmation of the report of the "commissioners, and in fact *appeared and presented their* "*objections*. The Court of Common Pleas is empowered "to consider *only such objections as are presented in writ-*"*ing*. It is true the Court may order the correction or "alteration of such assessments in any particular. But "nevertheless the *action of the Court is merely in review* "*of the report of the commissioners, in which their judg-*"*ment would necessarily be assumed to be correct* until "shown to be otherwise by testimony; if, indeed, the "Court is called upon, on such a hearing to determine "questions of fact any further than is necessary to ascer-"tain whether, in exercising their judgment, the commis-"sioners departed from or violated legal principles. The "opinion of a Court upon the testimony of witnesses, "who are selected for the evidence they will be disposed "to give, is a poor substitute for the judgment of commis-"sioners chosen for their peculiar fitness to perform such "duties, and having opportunity to examine the "grounds and acquaint themselves with all the circum-"stances which should influence their judgment. Their "report should not be set aside upon conflicting evidence, "nor overcome as evidence merely, except on clear proof "that it is erroneous (State *v.* Passaic, 37 N. J. L. 65; State "*v.* Rahway, 39 *Id.*, 646; S. C. 40, *Id.*, 615). It is manifest

" that a hearing on such a review is not an equivalent for a " hearing before the commissioners in the first instance."

Even assuming that the hearing provided for in Section 8 could extend to the confirmation of the report, it was plainly merely revisory or appellate. It was evidently the design of the statute that the question of the modification or confirmation of the assessment, should be determined solely upon the report and upon the documents and data if any, permitted to be filed with it. Otherwise, there is no propriety or reason in the minute provisions contained in this section for a hearing upon the question as to whether or not any documents or data are to be permitted to be filed with the report. If the hearing upon the question of the modification of the report, or of its final confirmation (assuming that any such hearing could be allowed), was to be a full hearing, upon which new evidence could be introduced, what difference could it make whether any documents and data were filed with the report or not? A hearing extending only to a comparison of the report with the documents and data used in preparing it, without the right to introduce new evidence was not sufficient. The opportunity for a hearing involved in the guaranty of "due process" is a party's right of " being heard by himself, his counsel and his testimony, " *more majorum*, according to the laws and customs of our " fathers, and the securities and safeguards of the consti- " tution " (7 Rob. Pr., 25).

But even if new evidence could be admitted upon the hearing in the County Court, and if the hearing could extend down to the final confirmation of the report, it was still merely revisory or appellate. The whole tenor of the statute shows that the intention was that, if no opposition should be made, the report should be confirmed as it stood. There is no provision anywhere in the statute for anything in the nature of a re-assessment. Even if new evidence could be admitted, it could be admitted only upon the question as to whether or not the assessment should be modified in certain particulars. If not modified, the Court could do nothing else than confirm it, and such a

mere right of review of an assessment, which is assumed to be *prima facie* valid, is not the opportunity for a hearing which is involved in the guaranty of due process, as is shown in the cases heretofore cited.

But the hearing, aside from being merely revisory or appellate, did not extend to the merits of the assessment nor to any question affecting the entire validity of the assessment, nor can any provisions be implied into it, for the purpose of extending it to such questions. As already stated, the express words of the statute simply provided for a hearing upon the question, whether or not the board should be ordered to file its report with certain documents and data, &c. When that order was granted or denied, the right of those assessed, including the petitioner himself, to be heard, was at an end, and the power of the Court to hear them was exhausted. So far as the express language of the statute goes, all the rest after the granting or denial of the order, down to the confirmation of the report, was to be done *ex parte*. If the Court should grant the order requiring the documents and data to be filed with the report, it was to make use of those documents and data in determining whether or not it would direct the report to be verified. If it refused the order, it had only the face of the report to act upon. But in either event there is no provision in the statute that any person should be heard, either upon the question of modification or upon the question of confirmation.

It was claimed, however, in the State Court, that the hearing provided for, could not be limited to the mere question of the filing of the report with the accompanying documents and data, for the reason that under the provision allowing testimony to be taken, and providing for the production of books and papers under the process of the Court those very documents and data might be brought before the Court without any such order. It was further claimed that so limiting the hearing to the question of the filing of the report and the accompanying documents and data, would leave no material issue upon which testimony

could be taken, as provided in Section 8. These positions are clearly untenable. In the first place, it is easy to conceive of a variety of issues which might be framed upon a petition for an order for the filing of a report, and other documents and data. The Board might answer that the documents and data applied for, were not in its custody, or were not pertinent. Or it might easily make different answers respecting different documents and data, thus raising a variety of issues upon which testimony could be taken.

And in the second place, it is certain that under the clause providing for the production of books and papers the board could not be required to bring into Court the report and documents and data, the filing of which was prayed for in the petition. We cannot attribute to the Legislature the absurdity of providing for a hearing upon the question as to whether or not such report and documents and data shall be filed, and then allowing either party, upon his own volition, to introduce upon such hearing those very documents. No court, acting under this statute, would have compelled the commissioners to produce their report and other documents and data, upon a hearing of the question as to whether or not an order should be granted requiring them to do so. Indeed, if the hearing took place during the thirty days allowed for an inspection of the report, the statute itself utterly precluded the production of the report upon the hearing, because it was expressly required that it should remain on file in the office of the board during those thirty days. This requirement, of course, did not extend to the documents and data used in preparing the report, but as to those the board might deny that it had them in its custody, it might deny their pertinency; it might deny that they were used in preparing the report. The Court would certainly not require the Board to produce documents upon the hearing when in its answer it denied having them in its custody. And if it could do so, those documents, &c., could be produced only for inspection. They could not be retained in Court to be used afterwards upon the modification and confirma-

tion of the report. To allow any such use of them would be like allowing a document, produced upon the trial of a suit to compel it to be delivered up to be canceled, to be retained and canceled immediately upon its production, without proceeding to judgment.

But assuming that all the documents and data which the Court could order to be filed could be brought in on the trial by proper process of the Court, the Court might nevertheless, deny the order requiring them to be filed, and thus dismiss them from its consideration, leaving the bare report to be acted upon in determining the question as to its modification and confirmation.

Even if the hearing provided for in Section 8 could be assumed to extend beyond the order for filing the report, and accompanying documents and data, to the question of its modification and its final confirmation, it was still manifestly not a hearing on the merits. Since the hearing, if any, after the denial or granting of the order for filing the report with the documents and data mentioned, must necessarily be limited in the former case to the face of the report, and in the latter case to a comparison of the report with the documents, it could not extend to any objection not appearing on the face of the report, or in some of the accompanying documents or data. Indeed, as the statute provided only for the filing of petitions by property owners, feeling themselves "aggrieved" by some action or determination of the board, "*as shown in said report*," the hearing upon such petition, even if it extended beyond the allowance or denial of the order prayed for, was necessarily limited to objections "shown in "said report." But whether it was limited to questions arising on the report and the documents and data filed with it, or to questions arising on the report alone, it could not in either case extend to certain objections going to the merits and indeed to the entire validity of the assessment. This the hearing could not extend to the constitutionality of the act, to the sufficiency of the resolution of the supervisors or of the notices published under Sections 6 and 7; or to secret frauds of the commissioners, and the

like, for none of the facts relating to these matters would appear in the report itself or in any of the documents or data, in the custody of the board and used by it in preparing said report.

Another conclusive reason why the hearing allowed under Section 8, even if permitted to extend down to the confirmation of the report, could not involve any objection going to the entire validity of the assessment, is that the Court had no power to set aside the assessment in its entirety. The only power conferred upon the Court with respect to the assessment, was a power to modify it, or rather to direct it to be modified, or to confirm it. The statute says: "*The Court shall have the power to* "*approve and confirm said report or refer the same* "*back to said board with directions to alter* or modify "the same in the particulars specified * * * in the "order." There is nowhere in Section 8 or elsewhere any provision of the statute empowering the board to set aside the report of assessment. The foregoing language by implication, excludes any such power. When the statute declares that the Court "shall have the power" to do certain things, it follows, by necessary implication, that it could not have power to do any other things than those expressed. It is a familiar rule of statutory interpretation that the express always excludes the implied. Or, in the language of the books, *expressio unius est exclusio alterius.* This is especially the rule of construction applied to statutes conferring a special or limited authority, such as that here in question. If the Court had no power to set aside the report, but could only direct it to be modified or confirm it, the hearing by that Court could not possibly extend to any objection which could be relieved only by setting aside the report. In other words, it could not hear any objection going to the entire validity of the report. It was necessarily excluded from hearing all questions as to the constitutionality of the statute, the validity of the resolution of the Board of Supervisors, insufficiency of publication of the notices required by the statute, the fact that the assessment was made by experts

and not by the commissioners, the excess of the cost of the improvement over the aggregate benefits, frauds and misconduct of the commissioners, affecting the entire assessment, &c.

That the County Court could not award any hearing beyond that expressly provided in the statute is clear both in principle and upon authority. It has always been held under statutes like this that the jurisdiction and powers of the confirming court can extend only so far as the statute expressly authorizes it. The statute is the Court's sole authority in such a proceeding. Whatever jurisdiction it possesses, it must find in the express terms of the statute. This results from the rule of strict construction always applied to such statutes. There are many cases in the books confirming this position (Matter of Mount Morris Square, 2 Hill, 14; *Re* Department of Public Parks, 85 N. Y., 463; *Re* Lange, *Id.*, 307; Visscher *v.* Hudson, etc., R. R. Co., 15 Barb., 45; Albany, etc., Bank *v.* Maher, 20 Blatch., 341–2; *Re* Manhattan R. Co., 6 N. E. Rep., 590; 102 N. Y., 302).

The cases of *Re* Department of Public Parks and *Re* Lange, *supra*, are peculiarly in point. The case of *Re* Lange, *supra*, arose under a statute providing for an assessment much like this. The statute authorized the tribunal, which was empowered to confirm the assessment, "to consider on the merits all objections made to any "assessment, and to subpœna and examine witnesses in "relation thereto, and to confirm said assessments, or to "refer the same back to the Board of Assessors for revisal "and correction, in such respects as they may determine."

Mr. Justice Andrews delivering the opinion of the Court said: "The act * * * authorizes the board "to hear *on the merits all objections, but its final action* "*is confined either to a confirmation of the assess-* "*ment, or to returning it to the Board of Assessors for* "*revisal or correction.* There is no power given to the "Board of Revision and Correction, to inquire into the "original authority to make the assessment, or to vacate "the assessment for defect of power in the city to im-

"pose it, and this power cannot, we think, be gathered "from the statutes creating it."

Again, in the case of *Re* Department Public Parks, 85 N. Y., 463, the statute authorized the Supreme Court, on the coming in of a report of an assessment for a street improvement, "after hearing any matter which may be "alleged against the same, either to confirm the said re- "port or refer the same to the commissioners for revisal "and correction," &c. Earl, *J.*, delivering the opinion, said that, under this authorization, the Court had no power to consider the constitutionality of that act or "the legality or validity of the proceeding," and that the confirmation left these matters unaffected, although the statute declared that the report, when confirmed, should be "*final and conclusive.*"

In these cases it will be seen that the power of the confirming court, by the express terms of the statute, was much broader than can possibly be claimed under the statute here in question, and yet, because the statute did not authorize such court to set aside the assessment *in toto*, it was held that it had no power to hear any objection going to the entire validity of the assessment. The same doctrine applies here.

In *Re* Mount Morris Square, 2 Hill, 14, under a statute authorizing an assessment like this, it was held that the confirming tribunal had no power to set aside an order of confirmation once made, for the reason that the statute did not expressly confer upon it any such power. The same doctrine is laid down in Visscher *v.* Hudson R. R. Co., 15 Barb., 45 (see also Hogan *v.* Baker, 2 E. D. Smith, 22; Weeks *v.* Lyon, 18 Barb., 531, holding similar doctrine).

The rule of construction applied to such a statute is the same in this particular, whether the question is as to the extent to which the judgment rendered upon the hearing therein provided for is to be deemed conclusive, or as to the constitutionality of the statute in providing for a hearing sufficient to satisfy the guaranty of due process. The latter was the question presented in Albany, &c., Bank

v. Maher, 20 Blatch., 341–2. There the statute provided for the review of the assessment after its completion, in the single point that the assessment upon the complaining party was "at a higher proportionate valuation than other property on the same row." There was nothing in the statute to prohibit a hearing on other grounds not specified. The Court, nevertheless, held that the scope of the hearing was not broad enough to constitute due process of law, and that it could not be extended by implication beyond the express terms of the statute. And because the opportunity for such a hearing did not constitute due process of law, the statute was held unconstitutional.

The case of Mulligan *v.* Smith, 59 Cal., 206, arising under the "Montgomery Avenue Act," upon which the Dupont Street Act was modeled, still further confirms our position. In that case it will be remembered the jurisdiction conferred upon the confirming Court was expressed in almost exactly the same terms as those employed in the Dupont Street Act. It was held in the opinion of Ross, McKee, Sharpstein and Thornton, *JJ.*, a majority of the Court, that under the statute "the County Court "could exercise only such jurisdiction as was expressly "conferred upon it, and that because the statute did not "expressly authorize it to do so, it could not hear or con-"sider or decide certain questions going to the entire "validity of the assessment, such as the sufficiency of the "petition of the taxpayers, which was the foundation of "the proceedings," &c. That decision was approved by this Court in Zeigler *v.* Hopkins, 117 U. S. 683 (see also Liebman *v.* San Francisco, 11 Sawy., 148). In Kahn *v.* Supervisors, 79 Cal., 388, it was also held, under the same statute, that the County Court could not, at least, conclusively determine the question of the sufficiency of the petition of the taxpayers.

Still another fatal objection to the sufficiency of the hearing provided for in Section 8 arises from the fact that the confirming Court was expressly clothed with the *discretion* to grant or deny the order applied for by the petition of any aggrieved property owner for the filing of the

report and the documents and data used in preparing it. After providing for a hearing upon the petition of such a property owner, Section 8 declares: "It *shall be in the dis-* "*cretion of the said court* after hearing and consider- "ing said *application, to allow said order or deny the* "*same.*"

Inasmuch as the hearing in the County Court, even if it extended to the final confirmation of the assessment, was necessarily confined to a revision of the assessment, in the light of the accompanying documents and data it was vitally essential that such documents and data should be filed, otherwise the hearing accorded was a mere barren right to examine the report itself, and to point out discrepancies appearing upon the face of it. Hence upon a showing of even apparent injustice a petitioner certainly ought to have been able to obtain an order for the filing of such documents and data. The statute, however, as we have seen, did not enable him to obtain such an order as an absolute right even upon the most ample showing. Whatever he might prove upon the hearing of the question as to whether the order applied for should be granted or denied, the Court could in its discretion refuse to grant it. We submit that the right to a hearing guaranteed by the Constitution is not a right merely to apply to the arbitrary, unlimited and uncontrollable discretion of a court. It is the right of a party to demand justice as his lawful due upon proving that he is entitled to relief. Manifestly, an opportunity to be heard in a cause is of little worth when it is discretionary with the Court whether it will grant the relief or not.

It is said in the opinion of the State Supreme Court that by the use of the word "discretion" in Section 8, it was "intended to submit the whole matter to the sound "judgment of the Court, to be exercised *according to the* "*rules of law.*" But "discretion" is defined as "the de- "cision of what is equitable, judicious or right, in view "of and guided by the circumstances of the case and the "wisdom of the magistrate, *unfettered by specific rules of*

"*positive law.*" We submit that this is the only fair construction of that term in this statute. If it had been intended to confer upon the County Court simply the power to give judgment according to the facts and the law with respect to the order applied for, the word "discretion" would not have been used. If that is what was meant, why was not the same word used in conferring power to confirm the report or refer it back for modification? The word imports something more than a power to give judgment, and it imports far less than "due process of law" to those whose rights are thereby affected.

In New Brunswick, &c., Co. *v.* Commissioners, 38 N. J. L., 190, a statute was in question which provided that in making an assessment like this, the commissioners should assess the cost of the improvement upon the lands benefited thereby "in such proportions as they should deem just and equitable." It was held that the statute was invalid because it laid down no definite rule of apportionment, but left the matter to the uncontrolled discretion of the commissioners. This case was approved and followed in Barnes *v.* Dyer, 56 Vt., 469. See also Cooley on Taxation, 2d Ed., 642. These authorities illustrate the position for which we contend, that in levying an assessment like this, none of the rights of the property owners are to be left to the discretion of any subordinate tribunal, or indeed of any tribunal whatever.

The discretion conferred upon the County Court enabled that Court to cut down the right of the property owner to a hearing to a mere right to inspect the report. Will it be pretended that a hearing which consisted simply in an examination of the assessment upon its face, without any evidence whatever, and without even the benefit of the documents or data used by the commissioners in making the assessment, was such a hearing as to satisfy the guaranty of "due process of law"?

6. NO OPPORTUNITY AFFORDED TO THOSE ASSESSED FOR A HEARING AGAINST MODIFICATION OF REPORT OR AGAINST ITS FINAL CONFIRMATION.

We insist that all those assessed to pay for this improvement were entitled to be heard against every petition for modification, as well as against the final confirmation of the report, and it is plain that no opportunity for such a hearing was provided for in this statute. It was insisted on the part of the defendants in error in the Court below, and a decision of the State Supreme Court seems to accord with that view, that upon the petition of an aggrieved property-owner setting forth objections to the report, and praying an order upon the board to file the same in court, together with accompanying documents and data, the County Court could only act upon the award of damages to the petitioner or upon the assessments of benefits against him, and that therefore the other property-owners assessed could not possibly have any interest in the subject-matter of such a petition and were not entitled to be heard against it. Even assuming it to be true that the Court could act only upon the damages awarded to the petitioner or upon the assessment of benefits against him, we maintain that the other property owners assessed to pay for this improvement were interested in such a petition and entitled to be heard against it, if they chose.

In the first place, and without regard to the relative or proportional character of the assessment provided for in this act, it necessarily follows, from the fact that the entire cost of the improvement was imposed upon the assessed property, that no particular award of damages could be increased, and no particular assessment of benefits reduced, without affecting all the other property owners interested in the assessment. Any increase in the award of damages asked for by the petitioner, contributed, *pro tanto*, to swell the aggregate cost of the improvement, and obviously all those assessed except the petitioner were entitled to an opportunity to be heard against such increase of the burden imposed upon them. On the other hand, any reduction of

the assessment of benefits imposed upon any particular lot increased the burden of the assessment upon all the other lots, and the owners of these lots were justly entitled to be heard against it. It was like a case of a debt to be paid by several debtors; any reduction of the amount paid by any particular debtor increased, *pro tanto*, the amount to be paid by each of the others. In such a case there can be no question that if any particular debtor should institute a proceeding to reduce the amount to be paid by him, or to determine such amount, all the other debtors would be entitled to notice and an opportunity to be heard in that proceeding. So here. As the entire cost of this improvement was imposed upon all those assessed, when the owner of any particular assessed lot instituted a proceeding to determine the amount which he should pay, or to have that amount reduced, all the other owners of assessed property were entitled to be heard, and if the statute did not provide for awarding them such a hearing it denied them due process of law, and is unconstitutional.

But aside from what has just been said, it is claimed by the defendants in error, and was so decided by the State Supreme Court, that this was not an assessment of actual benefits at all, but simply an assessment of relative or proportional benefits. We deny this, but we admit that the quality of *relativity* was ineffaceably stamped upon the assessment. The statute, as we understand it, contemplated an assessment of *actual* benefits apportioned upon some *uniform* plan which would make the benefits assessed against each lot, *strictly relative* and *justly proportional* to the benefits assessed against all the other lots.

In view of this relative or proportional nature of the assessment, it is still more clear that when the owner of any particular lot applied for a reduction of the sum set down against his lot for benefits, all the other owners of assessed property were justly entitled to a hearing on the petition. It is manifest that no particular assessment could be reduced without disturbing the relativity and proportionality of the entire assessment. This is equally as

apparent under the construction of the act adopted by the State Supreme Court as under our own construction. Construing the act in accordance with the views of the State Supreme Court, it did not require or authorize the commissioners to assess the actual benefits against each or any of the lots in the assessment district, or the actual aggregate benefits against all the lots. It empowered them simply to assess the ratio or proportion of benefits as among the lots assessed. In this view, when the assessors set down as the estimated benefits to Lot A the sum of one thousand dollars and against Lot B the sum of two thousand, and so on, this did not amount to a determination on their part that Lot A was actually benefited one thousand dollars and that Lot B was benefited two thousand dollars by the improvement, but simply that lots A and B were relatively benefited in the proportion of one thousand to two thousand. If this be true, then it is manifest that any reduction of the amount of the assessment against either of these lots would operate precisely like a proportional increase of the assessment against the other lot. For example : If the assessment against Lot B were reduced by one thousand it would make the assessment against the two lots exactly equal. The same result would follow if the assessment upon Lot A should be increased by one thousand dollars. Hence such reduction of the assessment against Lot B would, as against the owner of Lot A, operate precisely as if the assessment upon his own lot had been increased one thousand dollars. Indeed, it is simply elementary arithmetical truth that in a ratio any reduction of either member of the ratio is tantamount to a corresponding increase of the other member of it. It is manifest in this view of the matter that an application of the owner of any lot in this assessment district for a reduction of the assessment upon his lot, instituted a proceeding in which all the other owners of assessed property were justly entitled to be heard. They were just as much entitled to be heard against an application for such a reduction as they would have been if the application had

been made directly for an increase of the amount of the assessment against each of their lots.

Construing the statute in accordance with the views of the State Supreme Court, it is clear that an application of any particular owner of an assessed lot for a reduction of his assessment, was tantamount to an application for a revision of the entire assessment. It was in effect an application for the fixing of a new ratio of benefits in lieu of that found by the commissioners, since a reduction of any member of a ratio changes the ratio. The owners of all the lots in the assessment district were thus so indissolubly bound together in this assessment that no change could be made in any assessment without affecting all the rest; hence, in order to award to those assessed due process of law it was absolutely necessary that the statute should provide for a hearing to all upon the application of any particular property owner for a reduction of his assessment. This is clear upon our own construction of the statute. Upon our construction, also, it was necessary that the assessment should be strictly relative and proportional. It was necessary that the commissioners should adopt some uniform plan, so that their finding of the actual benefits to each lot would make the benefits to all the lots strictly relative and justly proportional. Any change in the amount of the assessment upon any particular lot necessarily disturbed this uniformity of plan. Besides, any such change operated directly to increase the amount to be paid by the owners of all the other lots, as in the case above supposed, of a debt due from several debtors. The right of other owners of assessed property to be heard against the petition of any particular property owner for a reduction of his assessment, is not only thus clear in principle, but is also supported by authorities. In *Lowell* vs. *Wentworth*, 6 Cushing, 222, under an ordinance providing for an assessment upon benefited property to pay for the construction of a sidewalk, it was held that every owner of property assessed for that purpose was entitled to notice and an opportunity to be heard, not only with respect to the assessment upon his own property, but also

with respect to the assessment imposed upon all the other property affected by the improvement, and that although a particular property owner was accorded an ample opportunity to be heard as to the assessment imposed upon his own property, the assessment was nevertheless void as against him, because the amounts assessed upon the property of all the other persons interested were fixed at a different hearing, and at another time and place, of which said property owner had no notice. Mr. Justice Metcalf, delivering the opinion in that case, said: "A certain sum is to be assessed on a certain number of "proprietors according to the extent and value of their "respective estates. *Each is interested in the amount to "be assessed upon all the others, and each should have an "opportunity not only to make suggestions and proofs "respecting his own estate, but also to hear and reply to "the suggestions and proofs of all others respecting "theirs.*"

See also *Gilkerson* vs. *Scott*, 76 Ills., 510.

There is a more glaring deprivation of due process in this case than in *Lowell* vs. *Wentworth*, *supra*. There, every property owner was accorded an opportunity to be heard at least upon the question of his own assessment. Here, as we claim, the statute allows no opportunity for a hearing at all except to a very limited class of property owners, and then only to such a limited extent as to be of no value.

We have thus shown, we think, beyond doubt, that even assuming that upon the petition of an aggrieved property owner under Section 8 of this statute the Court could fix only the amount of damages awarded to the petitioner, or the amount of the assessment against him, the other property owners were nevertheless fairly, justly, and constitutionally entitled to an opportunity to be heard against such petition, because of the relative and proportional character of the entire assessment, and also because the whole burden of the improvement was cast upon this assessment district.

It was claimed in the Court below, however, on the part of the defendants in error, that all of the property owners were in fact accorded an opportunity to be heard under Section 8, because they could all petition. This position is entirely untenable. The statute provided for petitions only by property owners feeling themselves *aggrieved* by some action or determination of the board, "*shown in said report.*" Hence a property owner who was satisfied with the original assessment, but desired to prevent any modification of it to his injury, certainly could not petition; so also a property owner who was dissatisfied with the report, but whose grievance did not appear upon the face of the report, could not petition.

But it was further claimed by the defendants in error, and this was the view adopted by the State Supreme Court, that although the statute does not expressly provide for any hearing of other property-owners upon the petition of one feeling himself "aggrieved," yet it does not prohibit such a hearing, and may be construed as impliedly allowing it. This position also seemes to us utterly untenable without rejecting the plain and explicit language of the statute. The statute expressly provided who should appear and contest a petition for modification. After providing for the filing of the petition, and for setting it down for a hearing, Section 8 says: "That parties filing said petition "*shall* * * * *serve a copy* thereof *on at least one of the mem-* "*bers of the Board* of Commissioners; and *said board may* "*appear* by counsel or otherwise *before said Court in re-* "*sponse to said petition; said board may file a written* "*answer to said petition* with said Court." Unless this statute is independent of all the rules of construction which from time immemorial have been applied to all statutes, and especially to statutes like this, conferring special and limited powers unknown to the common law, it is utterly impossible to hold, in the light of this language, that any one but the board could be notified of such a petition or could appear in response to it or could answer it. When the statute declared that said board "may appear" and "may file a written answer," it was tanta-

mount to a declaration that no one else could appear or file such answer.

"A statute that prescribes that a thing should be done "in a particular way carries with it an implied prohibition "against doing it in any other way" (*New Haven* vs. *Whitney*, 36 Conn., 375; *District Tp.* vs. *Dubuque*, 7 Iowa, 284). So "where the means for the exercise of a granted "power are given, no other or different means can be em- "ployed as being more effectual or convenient" (*Field* vs. *People*, 2 Scammon, 83). Again, "when a statute assumes "to specify the effects of a certain provision, we must "assume that all the effects intended by the lawmaker are "stated" (*Perkins* vs. *Thornberg*, 10 Cal., 189; citing *Lee* vs. *Evans*, 8 *Id.*, 424; *Bird* vs. *Jackson*, 7 *Id.*, 307; *People* vs. *Whitman*, 10 *Id.*, 30). See also cases elsewhere cited to show that under a statute of this kind no power can be exercised except such as is expressly authorized, and nothing can be done except what the statute explicitly allows to be done, and generally that such statutes are to be strictly and narrowly construed and followed.

Applying this doctrine here, it is manifest that, as the statute authorized only the Board of Commissioners to appear and answer the petition of an aggrieved property owner, no one else could appear or answer it, or take any part in the proceedings upon it. The opinion of the State Supreme Court, in speaking of the provision allowing the board to answer such a petition, says: "I do not regard "the fact that the commissioners were allowed to answer "the petition of the aggrieved party as of any conse- "quence." We respectfully submit that the learned Court had no right in construing this statute, especially in view of its character, to reject any provision in it as of "no consequence." No direction or provision of such a statute can be rejected as immaterial.

Not only is it necessary to reject the explicit language of this statute in order to afford a hearing to other property owners against the petition of one feeling himself aggrieved, but other provisions must be interpolated into it. It is necessary to strike out the provision that the

board may appear and answer, and to substitute in its place an implied provision that any one interested may appear and answer. We venture to say that no such rule of construction was ever applied to any other statute, especially to any other statute like this. Least of all, can such a construction be adopted to interpolate into such a statute a provision for a hearing which it does not contain, in order to sustain a fraudulent and conclusive judgment rendered without any hearing whatever, or any opportunity therefor.

Even if Section 8 could be construed as providing for a hearing of other property owners upon petitions for modification, it would be ineffectual for want of any provision for notice of such petitions, except to the board. The provision for service of such petition upon the board, and *upon no one else*, puts it beyond doubt that the Legislature did not intend that any one but the board should appear, or be heard against such a petition. The notice prescribed by Sec. 7 cannot be held to have been notice of the filing of such petitions for reasons already indicated. That notice did not and could not point to a hearing upon such a petition, especially if the notice was to be published, as it was published, during the period allowed for filing petitions. The provision for serving petitions on the board proves that the original notice was not intended to be a notice of such petitions. If the notice was not sufficient warning of the filing of such petition to the commissioners *who published it*, much less can it be deemed adequate warning thereof to property owners who might never see the notice.

The State Supreme Court refers to a number of decisions in other States as authorities for the position that the notice provided for in Sec. 7 was sufficient notice to other owners of assessed property of the filing of petitions by "aggrieved" property-owners, and that no other notice thereof was necessary. These cases are all distinguished from that now under consideration by radical differences in the statutes out of which they respectively arose.

The case chiefly relied upon as authority on this point,

is *Patterson* vs. *New York*, 1 Paige, 115. That case arose under the New York statute of 1813, which provided among other things that upon the completion of an assessment of this kind the commissioners should deposit it in the Clerk's office for inspection, and give notice by publication that it was so deposited, and that *it would be presented to a designated court for confirmation on a day specified in said notice.* It further provided that at any time within ten days after the first publication of said notice, any one interested might present to the commissioners his objections to said report; that the commissioners might modify the report in the particulars in which it was so objected to, if in their judgment said modification was required, and thereafter submit it to the Court for confirmation; and that the Court, after hearing any matter alleged against it, might confirm it or refer it to the same or other commissioners for reconsideration. In the case cited, the plaintiff sought to enjoin the enforcement of such an assessment, because the original report was changed to his detriment before submission for confirmation upon the objection of another property owner. There is a dictum in the case to the effect that notice of such objection or modification was unnecessary, because the original notice specified the time when the report would be presented for confirmation, and gave the plaintiff an opportunity to be heard against its confirmation as modified.

The difference between the case there presented and the case at bar is obvious. There the original notice specified the time when the report would be presented to the Court for confirmation. The modifications of the report were to be made before it was so submitted. Thus the original notice distinctly pointed to a tribunal, a time and place when every property owner could be heard against the report as a whole, or against any of the modifications made in it upon the objection of others. Besides, the property owners there had an ample opportunity for a hearing before the commissioners. Here we have no such case. Here the notice did not designate the time when the report would

be presented for confirmation, neither did it indicate any time when any petition for modification should be presented or heard. And there was no opportunity for a hearing before the commissioners. And, furthermore, *Patterson* vs. *Mayor* is verbally overruled by *Re Hamilton Avenue*, 14 Barb., 499.

Another case relied on by the State Supreme Court on this point is *Gilbert* vs. *New Haven*, 59 Conn., 472. The statute there in question was wholly unlike that presented here. It provided for a notice and a full opportunity for a hearing to all persons interested before and during the making of the assessment, and the complainant in *Gilbert* vs. *New Haven, supra,* actually appeared and was heard. That statute further provided for the submission of the assessment to the municipal council for confirmation, and that until so confirmed it should not be deemed "to be made or done." Under that statute the entire proceeding, from the first step until the final confirmation of the assessment, was made one entire continuous proceeding, and the original notice, under such circumstances, might well be deemed to be notice of the whole proceeding, especially as against one who actually appeared and was heard.

The case of *Chamberlain* vs. *Cleveland*, 34 Ohio St., 570, also relied upon by the State Supreme Court on this point, is in like manner clearly distinguishable from the case at bar. In that case the statute provided for a real and full opportunity for a hearing to all concerned under the original notice, and such notice might, therefore, be fairly regarded as dispensing with the necessity of any special motive for a particular application for modification. Besides, what was said in that case on this point was *obiter dictum*, the Court expressly declaring that it was unnecessary to decide the point (see page 567 of the Report).

In *Avery* vs. *East Saginaw*, 44 Mich., 587, another of the cases relied upon against us, it was simply decided that a board of equalization had jurisdiction to raise the assessment of a taxpayer without special notice to him, at

a session held pursuant to the general notice, published as required by law, at which he had ample opportunity to be heard, and that by such general notice each taxpayer was charged with presumptive knowledge of all that took place at the session affecting his assessment. That being a case arising under a general tax law, of course differed entirely from the case at bar. It might well be held in accordance with principles as heretofore stated, in discussing the distinction between special assessment statutes and general tax laws, that the necessity for prompt collection of the public revenue renders it impracticable to accord to each taxpayer special notice of proceedings before boards of equalization relating to his assessment. Besides, the general notice provided for in the statute under consideration in that case pointed every taxpayer to a tribunal, time and place where he could fully be heard. The notice provided for in the Dupont Street Act was not such a notice. And finally, the decision in *Avery* vs. *East Saginaw* is contrary to decisions in other States. Thus in *Kuntz* vs. *Sumption*, 117 Ind., 1; *same case*, 19 N. E. Rep., 474, it was held that a statute which permitted the raising of individual assessments by a board of equalization, without special notice to those whose assessments were thus raised, at a meeting of such board, held pursuant to a general public notice, like that mentioned in *Avery* vs. *East Saginaw*, was unconstitutional and void.

The cases of *Gates* vs. *Brooks*, 39 Iowa, 510; *Murphy* vs. *Graham*, 6 Paige, 625, and *Astor* vs. *N. Y.*, 62 N. Y., 588, relied upon on this point, have little, if any, bearing here, and so far as they apply at all, they are clearly distinguishable from this case, because of radical differences in the circumstances, and in the statutes under which they were decided.

It was suggested in the Court below that it was not necessary for other property owners to be heard against such a petition for the reason that the board represented them, and that the answer and defense by the board constituted a sufficient answer and defense on their behalf. Such a theory is clearly untenable in view of the relation

in which the board to all the property owners assessed. From the beginning to the end of the proceedings the board acted and was intended to act *in invitos* against the property owners. And when we come to examine into the facts of the case, the idea of holding the board to be a representative of any of those assessed becomes simply a grim joke. When we consider the frauds and misconduct of those commissioners, and the diligence which they manifested in keeping up expenses, and otherwise exaggerating the cost of the improvement as much as they possibly could, the idea of appointing them as representatives of those assessed is like making the wolf a shepherd to protect the sheep. Not only does this statute provide no opportunity upon the part of other property owners to be heard against the petition of one feeling himself aggrieved, but it provides no opportunity for any of the property owners to be heard against the final confirmation of the assessment. As we have already seen the only hearing provided for was the hearing allowed upon the filing of a petition of an aggrieved property owner for an order requiring the board to file its report with accompanying documents and data. There is no semblance of a provision for any further hearing. We maintain that in order to afford due process of law to those assessed, it was necessary that the statute should provide not only for a hearing for all other property owners upon each petition for modification, but also for a final hearing upon the question of the confirmation of the report, whether it was confirmed as it originally stood or after modification. Hearings upon petitions of aggrieved property owners, however ample or numerous, could not dispense with the necessity for such a final hearing. After all modifications had been made the report became, in effect, a new report, and we maintain that to constitute due process of law, the statute should have provided for a new notice to all those assessed upon the final presentation of this modified report for confirmation. Owing especially to the relative and strictly proportional nature of the assessment provided for in the statute, the modifications, how-

ever slight, changed the report entirely. By the original report the commissioners found not only the actual benefits to each of the lots assessed, but what they must be presumed to have deemed a just proportion of benefits among all those assessed. After the report had been modified in accordance with the numerous petitions presented, it became a finding of an entirely new proportion of benefits. The report, after modification, changed the burden of the assessment upon every lot affected by it. Not a single lot in the assessment district stood bound to pay the same amount of money towards this improvement after the report had been modified that it did before.

In New York it has been held under the Act of 1813 that where, by subsequent modifications the original report of an assessment of this nature has been thus changed throughout and has become in effect a new report, a new notice must be published before it is presented for confirmation, and a new opportunity for fresh objections and for a fresh hearing awarded (*Re Dover St.*, 1 Cow., 74-75; *Re John and Cherry Sts.*, 19 N. Y., 673-675; *March* vs. *Port Chester*, 71 *N.* Y., 309).

Upon the same ground we insist that the statute here should have provided for a new notice after the modification of the report in order to enable those assessed to be heard against its final confirmation. The original notice prescribed by Section 7 cannot be deemed sufficient notice of the final presentation of the modified report for confirmation, not only because the modified report was not in fact the same report as that mentioned in the notice, but also because the statute limited no time in which the report should be presented for confirmation. The only limitation upon the presentation of such a petition contained in the statute is, that it shall be presented if no petitions of aggrieved taxpayers are filed. Since the statute allowed thirty days for the filing of petitions by the property owners, of course a petition for confirmation could not be filed until after the expiration of that period. The statute, however, contained no limitation of the time within which it should be filed. The board might file it

immediately, or it might not file it for years. On this ground it was perfectly manifest that the original notice prescribed by Section 7 cannot possibly be deemed to be notice at all, much less adequate notice of the final confirmation of the report, or of any opportunity to be heard thereon.

Besides, the words of the statute utterly preclude any hearing upon the final confirmation of the report. Section 8 expressly provides that after the report has been modified as directed by the Court, "The said Court *shall* "then *approve and confirm said report.*" The duty to confirm being thus imperative, a hearing upon the question of confirmation would have been useless.

The State Supreme Court suggests that our construction of this statute, with respect to the hearing allowed by it, would render provisions for such a hearing simply farcical. Admitting this to be so, we submit that it is no reason for implying into this statute reasons for a hearing which it does not contain, especially after the assessment has been imposed without a hearing. The construction of the statute, which the learned Court thus pronounces to be farcical, is a construction derived from the plain reading of the statute itself. It requires no construction. It construes itself. Its language is plain and easily understood. We simply ask that it shall be held to mean what it says. We simply call attention to its plain and specific words and ask the Court to construe it in accordance therewith. If it provides for a hearing which, if accorded, would be simply trivial and farcical that is not our fault; it is the fault of the statute. We admit that the hearing provided for is not an adequate hearing, and it is because it is not so that we claim the statute to be unconstitutional. We admit that it provides for a hearing upon comparatively trivial questions and for a hearing upon no other questions. We admit that the hearing provided for does not extend to the merits, but is limited merely to the comparatively unimportant question whether or not the report of the commissioners shall be filed with or without the documents and data used in preparing it. It is because the

hearing provided for is thus meagre and cramped, and indeed trivial and farcical, that we insist that this statute does not award due process of law, is unconstitutional and void.

7. ASSESSMENT BEING ON ITS FACE IN EXCESS OF THE ASCERTAINED BENEFITS, WAS OBVIOUSLY VOID FOR WANT OF JURISDICTION AND DUE PROCESS.

(*a.*) *Power of assessment in cases of this kind is strictly dependent upon and commensurate with the special benefits to the assessed property.*

It appears on the face of the assessment in this case, and of the order confirming it, that the gross amount of benefits to the property assessed accruing from this improvement was found to be $796,837, while the gross cost, damages and expenses of the improvement assessed upon that property were ascertained to be $914,991, or about $118,000 more than the benefits (Rec., p. 259).

But even this enormous sum was not the limit of the assessment. The board issued bonds to be paid out of the assessed property for $1,000,000, or nearly $100,000 more than the stuffed and padded estimate of gross cost, damages and expenses, and more than $200,000 beyond the ascertained benefits accruing from the improvement to the assessed property. If there is any principle of law or justice or right reason which can even palliate the enormity of this stupendous, lawless and wicked exaction, or which can clothe its hideous indecency with even the outward seeming of "due process," we have been unable to discover it.

That the power of assessment of the cost and expense of an extraordinary local public improvement, like that here in question, upon adjacent property benefited thereby is solely derived from, and measured and limited by, the actual special benefits from such improvement accruing to such property, above and beyond the general benefit to the

entire community, is settled by an absolutely overwhelming and constantly increasing array of authorities.*

The ancient authority of Sewer Commissioners in England has always been held subject to a similar limitation. A final decree of such commissioners imposing an assessment upon adjacent property to pay for the construction of a sewer or the like was always held impeachable collaterally by showing that property assessed thereunder was not benefited and, therefore, that there was no jurisdiction or power to assess it. (Bow *vs.* Smith, 9 Mod., 94; Neave *vs.* Weather, 3 Ad. & El. (N. S.), 1072; See also Rex *vs.* Justices, 3 Burr., 1530.)

In the leading opinion on the State Supreme Court in this case it is laid down that this power of assessment is merely a branch of the general power of taxation for revenue, and is dependent upon and measured by the benefit accruing from the improvement, to pay for which any

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* Cooley Tax. (2d Ed.), 606–675; 2 Dill. M. C. (3d Ed.), 759; 2 Desty Tax., 1237; Welty Assessment, 415; Taylor *vs.* Palmer, 31 Cal., 254; Creighton *vs.* Manson, 27 Cal., 624; *Re* Market Street, 49 *Id.*, 546; People *vs.* Lynch, 51 *Id.*, 15; Peay *vs.* Little Rock, 32 Ark., 31; Nichols *vs.* Bridgeport, 23 Conn., 189; Bridgeport *vs.* New York, &c., R. R. Co., 36 *Id.*, 262; Chicago *vs.* Larned, 34 Ill., 203; Lee *vs.* Ruggles, 62 Ill., 427; Crawford *vs.* People, 82 *Id.*, 559; Gridley *vs.* Bloomington, 88 *Id.*, 554, 557; Chicago *vs.* O'Brien, 111 *Id.*, 535; Davidson *vs.* New Orleans, 34 La. An., 170; Dyar *vs.* Farmington, 70 Me., 527; Brooks *vs.* Mayor, 48 Md., 267; Jones *vs.* Alderman, 104 Mass., 469; Minnesota, &c., Co. *vs.* Palmer, 20 Minn., 468; State *vs.* District Court, 29 *Id.*, 62; Macon *vs.* Patty, 57 Miss., 383; McCormack *vs.* Patchin, 53 Mo., 36; Zoeller *vs.* Kellogg, 4 Mo. App., 163; Lohrum *vs.* Eyermann, 5 *Id.*, 483; Hanscom *vs.* Omaha, 11 Neb., 41; Tidewater Co. *vs.* Coster, 18 N. J. Eq., 518; State *vs.* Newark, 27 N. J. L., 185; State *vs.* Hoboken, 36 *Id.*, 291; State *vs.* Jersey City, 37 *Id.*, 128; Jersey City *vs.* Freeland, 43 *Id.*, 638; State *vs.* Paterson, 48 N. J. L, 435; Schenley *vs.* Commonwealth, 36 Pa. St., 57; McGonigle *vs.* Allegheny, 44 *Id.*, 121; Hammett *vs.* Philadelphia, 65 *Id.*, 150, 153; Washington Avenue, 69 *Id.*, 364; Wistar *vs.* Philadelphia, 80 *Id.*, 505; Seely *vs.* Pittsburgh, 82 *Id.*, 360; *In re* Sawmill Run Bridge, 85 *Id.*, 169; Philadelphia *vs.* Keith, 2 Atl. Rep. (Pa.), 207; Protestant Orphan Asylum's Appeal, 111 Pa. St., 135; Allentown *vs.* Adams, 81 *Id.*, 430; *In Re* Paving 10th Street, 4 East. Rep., 341; *Re* Fourth Avenue, 3 Wend., 452; Chamberlain *vs.* Cleveland, 34 Ohio St., 554–561; Taylor *s.* Chandler, 9 Heisk. 366; Barnes *vs.* Dyer, 56 Vt., 470; Norfolk *vs.* Ellis, 26 Gratt., 246 (per Anderson and Boulding, *JJ.*); Hale *vs.* Kenosha, 29 Wis., 606; Donnelly *vs.* Decker, 58 *Id.*, 464; Union Pacific R. R. Co. *vs.* Meyers, 115 U. S., 1; Board *vs.* Vauxhall, &c., 7 Ell. & B., 980; Stafford *vs* Hamston, 2 Bro. & B., 691.

particular assessment is made, only in the same way that all taxation is based upon supposed benefit to the taxpayers. This is clearly erroneous. There is a very marked distinction between the power of general taxation and the power of special assessment upon benefited property to pay for a particular improvement, with respect to the benefit upon which they are respectively based, as is shown in Cooley on Taxation (2d Ed.), 606, and in a multitude of decisions.

Judge Cooley shows, in effect, among other things that a tax is a public burden imposed without regard to any particular benefit to be derived from that particular exaction, the general benefit of good government, and the necessity of maintaining it, being the source of the power, while a local assessment is merely the exaction of compensation for a special benefit of those assessed, beyond the rest of the public, from the construction of a public improvement (Cooley on Tax., 2d Ed., 606).

The same distinction is concisely stated by Mr. Justice Bronson in Sharp *vs.* Spier, 4 Hill., 82; approved and followed in Creighton *vs.* Manson, 27 Cal., 620.

To the same effect as to the distinction between a tax and a special assessment are: Doyle *vs.* Austin, 47 Cal., 358; People *vs.* Lynch, 51 *Id.*, 15; Bridgeport *vs.* New York, &c., R. Co., 36 Conn., 262; Macon *vs.* Patty, 57 Miss., 385, 386; Chamberlain *vs.* Cleveland, 34 Ohio St., 561, 562.

And generally as to the essential distinction between these two classes of public exactions, see Emery *vs.* San Francisco Gas Co., 28 Cal., 345; Burnett *vs.* Sacramento, 12 *Id.*, 76; Chambers *vs.* Satterlee, 40 *Id.*, 514; Opening Casacalvo, &c., Street, 20 La. An., 497; Allen *vs.* Galveston, 51 Tex., 302; Macon *vs.* Patty, 57 Miss., 385, 386; see opinion of Mr. Chief Justice George in the case last cited.

The doctrine that this power of special assessment is strictly dependent upon and bounded by the special actual benefits accruing from the particular improvement to the property assessed is nowhere better stated than in Chamberlain *vs.* Cleveland, 34 Ohio St., 561, 562, a case which,

in many of its features, is strikingly analogous to the case at bar, although dissimilar in others.

This doctrine is abundantly sustained and variously illustrated by the long line of decisions heretofore cited and by many others which may be cited. As stated in Brooks *vs.* Mayor, 48 Md., 267, the underlying idea of an assessment of this sort is that the property assessed is enhanced in value by the improvement to an amount at least equal to the sum assessed against it, the assessment not being a tax resting entirely upon the ground of equal benefits received. In Taylor *vs.* Palmer, 31 Cal., 254, also, the power to levy such an assessment is described as "a power to tax specific property FOUNDED UPON THE "BENEFIT supposed to be derived by the property itself "from the expenditure of the tax in its immediate vicin-"ity. Hence property not benefited by the improve-"ment cannot be subjected to the burden imposed for "that purpose."

Again, in *Re* Market Street, 49 Cal., 549, the Court says: "The BASIS * * * IS THAT OF BENEFIT DERIVED "TO THE PROPERTY ASSESSED, * * * the amount as-"sessed being, as observed by Mr. Justice Bronson, 'an "'equivalent or compensation for the enhanced value,' "* * * 4 Hill, 82, * * * ''TIS ONLY BECAUSE OF THE "'SPECIFIC BENEFIT RECEIVED that specific property is taxed "'for a specific purpose.'" And in the early case of Creighton *vs.* Manson, 27 Cal., 624, it is said: "THE "ASSESSMENT MUST NOT EXCEED THE VALUE OF THE BENE-"FIT CONFERRED BY THE MAKING OF THE IMPROVEMENT," &c. Similar expressions abound in the other cases cited.

The essential character of such assessments is indicated by the significant name of "Assessment for Benefits," distinctively applied to them (People *vs.* Parks, 58 Cal., 655).

The "benefit" which will authorize such an assessment must, as already stated, be special and peculiar, and not the general benefit accruing to the assessed property, and

not such as are common to the entire community (Jones *vs.* Alderman, 104 Mass., 469; Union Pacific R. Co. *vs.* Meyers, 115 U. S., 1).

The benefit must be direct and immediate and not contingent or remote to authorize the imposition of the assessment, and if it is of the latter kind rather than the former, as to any of the property assessed, that will constitute a sufficient ground of defense against the assessment upon that particular property (Bridgeport *vs.* New York, &c., R. R. Co., 36 Conn., 262; City *vs.* West Middle District, 45 *Id.*, 464).

And the benefits upon which this power of special assessment is based, and those underlying the power of general taxation, are further distinguished, as the authorities show, in this: That the former are actual benefits whose present or future existence, as the result of the particular improvement in question, must be judicially ascertained as a fact before the power can be exercised, while the latter are merely the implied benefits resulting from the maintenance of the government, whose existence is conclusively presumed.

The authority to levy such an assessment is generally held to be referable rather to the power of eminent domain than to that of general taxation. The assessment is regarded *pro tanto*, as a taking of the property for public uses and the benefits of improvement constitute compensation for the taking. This being true, it is clear that in order to constitute just compensation the benefits must equal or exceed the assessment imposed. Otherwise there is no constitutional authority to impose it.

(*b.*) *The power of assessment being thus limited by the actual special benefits, the assessment in this case being in excess of the benefit was wholly void if the commissioners had the power to find the fact and quantum of benefit.*

The special benefit, accruing from a public improvement, to the property specifically assessed to pay for it, being thus the source, measure and boundary of the power to assess

it, it necessarily follows that if the aggregate cost of the improvement exceeds the judicially ascertained aggregate benefit to the property assessed the entire assessment is void, as in excess of jurisdiction (Cooley Tax, 2 Ed., 461, 661; Dill. Mun. Corp. (3d Ed.), Sec. 761; Creighton *vs.* Manson, 27 Cal., 624; *Re* Market Street, 49 *Id.*, 549; Crawford *vs.* People, 82 Ill., 557; Tide Water Co. *vs.* Coster, 18 N. J. Eq., 518; State *vs.* Hoboken, 36 N. J. L., 291; State *vs.* Paterson, 37 *Id.*, 380, 381 and 383; State *vs.* Newark, *Id.*, 415; State *vs.* Road Com., 41 *Id.*, 83; Canal Bank *vs.* Mayor &c. of Alb., 9 Wend., 244; *Re* Albany Street, 11 *Id.*, 148; Chamberlain *vs.* Cleveland, 34 O. St. 561; Hammett *vs.* Philadelphia, 65 Pa. St., 151, and other cases above cited).

In State *vs.* Paterson, 37 N. J. L., 383, the Court say : "If, in putting the law into practical operation, it shall be "ascertained that the Legislature has selected a district so "circumscribed, that the benefits which flow from the "authorized improvement are not equal to its cost, the "enactment would furnish no lawful authority to make "an assessment in excess of actual benefits."

An assessment in excess of the actual benefits is as already stated, *pro tanto*, a taking of the property without "just compensation" (Cooley Tax., 2 Ed., 661; Zoeller *vs.* Kellogg, 4 Mo. Ap., 163 ; Davidson *vs.* New Orleans, 34 La. An., 170, and other cases heretofore cited).

Where under the power of eminent domain it is attempted to take property without just compensation, the rule is, not that the taking shall be allowed to the extent that the compensation is adequate, but that the whole proceeding is void, and that the taking of any of the property may be enjoined. The same rule applies here. The assessment being the only source of payment of the cost of this improvement, if the assessment exceeds the benefit it is not merely the excess which is void, but the entire assessment must fail (Canal Bank *vs.* Mayor, &c., Albany, 9 Wend., 252, and other cases above cited).

An assessment of this kind must, indeed show affirma-

tively, on its face, that it does not exceed the benefits, but that the aggregate benefits are at least equal to the aggregate assessment, and that the burden is apportioned among the parcels of property assessed in proportion to the actual benefits, in accordance with the rule that in the exercise of a special and limited authority the proceedings must show on their face that the authority has been strictly pursued (Crawford *vs.* People, 82 Ill., 559; Chamberlain *vs.* Cleveland, 34 O. St., 567; State *vs.* Hudson, 29 N. J. L., 104; State *vs.* Newark, 36 *Id.*, 172).

In this case the proceedings instead of showing on their face that the benefits equaled or exceeded the amount of the assessment showed the exact contrary. The enforcement of such an assessment would present a plain case of naked confiscation without the semblance of "due process of law."

If the Legislature, after this assessment, thus void on its face, had passed an act confirming it, the act would have plainly been unconstitutional and void. In the language of Judge COOLEY: "Such action would have been manifestly colorable and arbitrary, would give demonstration "that the proper authority had never determined the case "on the principles of taxation, and such wrong must "always be open to correction. A man's property is not to "be taken from him with impunity and without redress "by simply calling the appropriation an assessment when "it is not."

But the State Supreme Court held that the commissioners were not authorized to find the quantum of benefits in this case, but only the relative benefits. If this be so, then the statute must be construed as arbitrarily declaring in effect that the benefits to the property within the assessed district will equal the aggregate cost and expense of improvement. So construing the act it is unconstitutional, as will hereafter be shown. But is this the true construction?

(c.) *Had the commissioners power to find fact and quantum of benefit?*

To determine whether the act does provide for the finding by the commissioners of the fact and quantum of benefits we refer to the sections of the statute bearing upon that question. The sections which are said by the State Supreme Court, to determine the question of the existence and sufficiency of the benefit to the property in the assessment to justify the improvement, are Sections 2 and 3. Section 2 provides, that the cost and expense of the improvement "shall be assessed upon the district "*hereinafter described as benefited by said* widening." Section 3 provides, that "the district benefited by said "improvement and upon which the cost of making the "same shall be assessed, is hereby described and designated "as follows," &c.

The foregoing are the only sections which can be tortured into the semblance of a declaration on the part of the Legislature, that the property in the assessment district is benefited at all, much less that it is benefited to the extent of the entire cost of improvement. The utmost that can be claimed from these two sections is simply that the Legislature undertook to define and describe the district which was to be specially and peculiarly benefited by the improvement. There is not a word in either section which indicates any intention on the part of the Legislature to declare that the benefit to the property in that district would be equal to the entire cost of improvement, or, indeed, that all the property in that district would be benefited at all. Applying to these sections, therefore, the rule of strict construction, which is uniformly held to be the proper rule for interpreting statutes of this kind, it certainly cannot be held that it determines either of those facts, conclusively or otherwise. The second section simply refers to the third for a description of the district benefited; and the third simply defines and bounds "the district benefited by said improvement." It is utterly impossible, upon any known rule of statutory

interpretation, to construe these sections as having the meaning attributed to them in the opinion of the State Supreme Court; nor is there any other section in the entire statute capable of any such construction.

We maintain, further, that the statute does explicitly provide for a finding by the commissioners of the fact and quantum of benefits to property in the assessment district.

The section which described the duties of the commissioners with respect to the appraisement of damages and assessment of benefits is Section 7. In that section, after directing how the damages are to be appraised, it is provided as follows: "Said board shall also proceed to ascer- " tain and set down in a written report a description of " the several subdivisions or lots of land included in the " districts designated in Section 3 of this act, and oppo- " site to such descriptions shall set against each lot or sub- " division THE SUM OR AMOUNT in which, according to the " judgment of the board, the said LOT HAS BEEN OR WILL " BE BENEFITED BY REASON OF THE WIDENING OF SAID " STREET RELATIVELY TO THE BENEFITS ACCRUING *to other* " *lots* of land within said designated districts.

The State Supreme Court holds that this language did not authorize the commissioners to find the *amount* of the benefits accruing from the improvements to the entire assessment district or any lot therein. It says that, "It only requires the commissioners to estimate " the benefit which will accrue to each lot relatively to " the benefit to accrue to other lots." That is to say, that the commissioners were authorized to find only the *ratio* or *proportion* of benefits among the different lots in the assessment district.

We insist that the foregoing provision is not capable of any such construction. It says as plainly as words can say it, that a board shall " ascertain and set down opposite " to the description of each lot in the assessment district " the SUM OR AMOUNT in which, according to the judgment " of the board, the said lot has been or will be benefited " by reason of the said widening." If this language did not authorize the commissioners to find THE SUM OR

AMOUNT OF BENEFITS, what language would have that effect? It is true that the section goes on to provide t ha these benefits shall be "ascertained and set down relatively to the benefits accruing to other lots." But this does not make it any the less their duty to ascertain "the sum or amount" of benefits as previously directed. As already explained, they were to find the actual benefits to each lot upon some uniform plan, which would make them strictly proportional to the benefits to other lots. It can readily be seen, that even though the commissioners had undertaken to determine, honestly, the actual benefits to each lot, they might nevertheless determine the benefits to different lots upon such different theories as to make them entirely disproportionate one to another. It was to guard against this that the Legislature required the benefits to each lot to be determined "relatively to the benefits accruing to other lots." It was to prevent the very thing which actually happened in this case: the application of unequal rules of appraisement and assessment to different lots.

The language of the foregoing provision of Sec. 7 cannot possibly be construed as authorizing a mere finding of a ratio or proportion of benefits among the lots assessed without holding a part of its language to be absolutely meaningless. If the commissioners were to find only such a ratio in proportion of benefits, no possible meaning can be attached to the provision that they were "to proceed to ascertain and set down * * * THE SUM OR AMOUNT" of benefits to each lot. This provision for finding "the sum or amount" of benefits is utterly irreconcilable with the theory that only a *ratio* or *proportion* of benefits as among the lots assessed was intended to be found.

There are other sections of the statute which throw a very clear light upon this provision. Thus, in Section 13, it provides that the tax shall be annually levied "upon the lots described in Section 3 of this act," for the payment of interest on the bonds issued under the act. It is further provided that "said tax shall be

collected out of the said land only," and that the assessment therefor shall be adjusted and distributed according to the ENHANCED VALUES of the respective parcels of land as *fixed in the said final report* by said board. It is further provided in the same section that a tax shall also be levied each year "upon the same lands and in accord- "ance with the same rules of assessment upon the EN- "HANCED VALUES for the payment of a proportion of the "principal of the bonds."

It is clear from these provisions that the benefits ascertained and set down by the commissioners were to be the actual "ENHANCED VALUES" of the respective lots arising from the improvement. That is to say, the commissioners were to ascertain and set down in their report, opposite to the description of each lot, the sum in which, in their judgment, the value of said lot would be enhanced or increased by the improvement. The sum to be set down was the difference between the value of said lot before the widening and its value after the widening, and resulting therefrom. The words "enhanced values" have no meaning whatever if the sums which the commissioners were to ascertain and set down in their report were merely *abstract figures* to show a *ratio* or *proportion* of benefits.

Again, in Sec. 14 provision is made for the preparation of certain books to be kept in the office of the assessor relating to this assessment. It is there provided that the commissioners in preparing such books shall, among other things, give a description of each of the subdivisions of land in the assessment district, and "shall set opposite to "each description of such several subdivisions THE AMOUNT "OF BENEFITS OR ENHANCED VALUE TO SAID SUBDIVISION "AS ESTABLISHED BY SAID CONFIRMED REPORT by reason "of the opening of said street." The section further provides that the tax levied to pay the interest and principal of the bonds issued in pursuance of the provisions of this act shall be apportioned on the lots described in Section 3 of this act IN STRICT ACCORDANCE TO ANY ENHANCED VALUES OF THE RESPECTIVE PARCELS THEREOF AS ESTABLISHED BY SAID CONFIRMED REPORT. Again, it pro-

vides that, if any of the assessed lots shall be subdivided after the assessment, it shall be the duty of the assessor "to equitably apportion THE SUM OF THE BENEFITS UPON AND ACCORDING TO THE NEW SUBDIVISIONS" of said lot.

Here again we have several distinct declarations of the definite purpose of the Legislature that the benefits which were to be ascertained and set down by the commissioners were to be not simply a ratio of benefits, but the actual benefits or "enhanced values." The language employed in Section 14 shows, as clearly as it could be shown by any conceivable form or words, that what the commissioners were to ascertain with respect to each lot was "*the amount of benefits*" or "*the enhanced values*" of the several lots. That language, like the language of Sections 7 and 13, is utterly irreconcilable with the theory of a finding of a mere *ratio* or *proportion* of benefits, and not of the amount or quantum of actual benefits.

Taking the whole act together, we think it too clear for controversy or doubt that the Legislature did not intend by this act to determine in advance by its own declaration the question of actual benefits to result from the proposed improvement to the assessment district or to any of the property therein, or the extent or quantum of such benefits; much less did it intend to determine arbitrarily that the benefits would equal or exceed the cost of the improvement. It plainly intended that the commissioners should determine the whole question of benefits as well as damages. It intended simply to point out the assessment district and to define its boundaries, leaving to the commissioners the duty of determining the question as to whether or not particular lots within that district were in fact benefited and the extent of such benefit, if any, as well as the question whether or not the aggregate benefits to the assessment district would equal or exceed the aggregate cost and expense of such improvement. If the Legislature did not intend this, then we must assume that it designed to pass an oppressive and unconstitutional act.

Even assuming that the Legislature possessed the con-

stitutional power to determine arbitrarily in advance the fact and quantum of actual benefits to the lands in this assessment district, certain it is that the intent to exercise such power ought not to be implied into a statute in the absence of express and unmistakable provisions for it. It is a power which, if it exists at all, and this we vehemently deny, is obviously so extraordinary, so arbitrary, so uncontrollable, so utterly subverse of all the time-honored safeguards and muniments of property rights, that an intent to exercise it ought not to be imputed to the Legislature unless plainly, explicitly and unequivocally declared. No statute susceptible of any other reasonable construction should be held, upon mere implication, however strong, to have been enacted for such a tyrannical purpose.

There is, as we have seen, not a word in the act here in question expressive of any intent to exercise any such monstrous and despotic power. Every section, sentence, clause and word in the statute is entirely reconcilable with the construction that the Legislature simply defined the district specially and peculiarly benefited by the improvement, and to which the special assessment to pay for said improvement was, therefore, to be confined, leaving to the commissioners the power of determining what property within that district was so benefited, and the extent of the individual as well as the aggregate benefit.

And, furthermore, we submit, that in the very nature of the case the commissioners were compelled to find the actual benefits in order to find the ratio or proportion of benefits. How could they determine how much any lot would be benefited by the improvement "relatively to the benefits accruing to other lots" without first finding what would be the actual benefit to each lot? The value of a ratio cannot be known until the value of each number of the ratio is known. There can be no known ratio or proportion between unknown quantities. The ratio x to y is obviovsly insoluble and unknowable so long as the value of either x or y is unknown. Hence, even if the Legislature had simply authorized the commissioners to

find the ratio of benefits it would have involved, by necessary implication, the finding of the actual benefits to the assessed property. Not only so, but it would have involved also the power to determine whether or not any particular lot was in fact benefited. How could the commissioners find the ratio of benefits between lots A and B if, upon investigation, they should find that lot A was not benefited at all? There can be no ratio between zero and an actual quantity.

In construing this statute as empowering the commissioners to find the fact and quantum of individual as well as aggregate benefits, we are amply supported by authority. There are numerous decisions so construing statutes very much less explicit than the Dupont Street Act. (Doyle *vs.* Austin, 47 Cal., 354; Piper's Appeal, 32 Cal., 533 to 541; Chamberlain *vs.* Cleveland, 34 O. St., 564, 566 and 567; Passaic *vs.* State, 37 N. J. L., 529; *Re* Drainage of Lands, 35 *Id.*, 502, and other cases.)

In Doyle *v.* Austin (*supra*) the act in question was the Montgomery Avenue Act, upon which the Dupont Street Act was modeled, as heretofore stated. The provisions of the Montgomery Avenue Act with respect to the powers of the commissioners in appraising damages and assessing benefits, were precisely the same as those of the present act. The commissioners under the Montgomery Avenue Act construed that act in this respect just as we construe the act now in question. They regarded it as authorizing them to ascertain the quantum of actual benefits to each lot, and not the mere *relativity* or *ratio* of benefits. They reported the cost of the improvement at $1,000,000 and the aggregate benefits to the assessed property at $6,000,000. And not only did the commissioners construe that act as authorizing the finding of the fact and quantum of benefits, but it was so construed by the Court in the case of Doyle *v.* Austin, above cited. The question in that case was whether the tax to pay the cost of the improvement should be based upon the total value of the property as enhanced by the improvement or merely upon the enhanced value as set down in

the report? The Court said: "The assessment complained "of was adjusted and distributed upon the respective "amounts which the board reported would be the enhance- "ment in value of the several parcels of land, and not "upon the total value of each parcel, as enhanced by the "improvement. In other words, THE ASSESSMENT WAS "LIMITED TO THE INCREASE OF VALUES, and excludes from "the computation the values of the respective parcels "without the improvement. WE THINK THIS WAS THE "CORRECT BASIS FOR APPORTIONING THE ASSESSMENT. The "theory upon which the whole scheme proceeds is that "EACH PARCEL OF LAND IS TO BE ASSESSED ACCORDING TO "THE BENEFIT IT WILL RECEIVE AND not according to its "total value as enhanced by the improvement. A lot "worth $1,000 may be enhanced in value $5,000, while "another lot worth $10,000 would not be enhanced in value "$1,000 worth by the improvement. THE INTENTION OF "THE STATUTE CLEARLY IS, that in such a case, EACH LOT "SHALL BE ASSESSED ACCORDING TO ITS INCREASE IN VALUE, "and not according to the sum total of its value, as en- "hanced by the improvement."

This extract from the opinion in that case clearly indicates that the Court construed the act as requiring a finding of the actual enhancement of value of each lot assessed, since this enhancement of value was to be the basis of future assessments to pay the bonds. A similar construction was put upon an earlier California statute in Piper's Appeal, 32 Cal., 538 to 541.

The act there in question was one enacted in 1864. It provided for the fixing of the assessment district upon notice and a hearing, and authorized the commissioners to apportion and assess the whole amount of damages, and so forth, from the proposed improvement, upon all the owners of land within said district, AS NEAR AS MAY BE IN PROPORTION to the benefits, &c. Judge Sawyer in Piper's Appeal, *supra*, manifestly construed this act as empowering the commissioners to find not merely a ratio or apportionment but the quantum of actual benefit to each lot.

He said that there were two points presented upon the appeal: First, that the appellant was assessed in excess of his actual benefit. Second, that if the appellant's benefit was correctly reported his assessment was relatively too high as compared to that imposed upon other lots. Judge Sawyer made no question as to the jurisdiction to entertain both objections. Indeed, in that case it seemed not to have occurred to anybody that the commissioners had only power to find a ratio of apportionment and not the amount of actual benefits. And yet that statute was not so explicit on this point as the Dupont Street Act. Even if it had been construed as requiring a finding of only a ratio of benefits it would not militate against us here because of manifest differences in the two statutes.

In Passaic *vs.* State, 37 N. J. L., 539, a statute was under consideration which provided for an assessment upon adjacent property to pay for grading a street. The act provided that the assessment should be "in proportion to the benefit to be received by each lot or parcel thereof.' The Court held that, by this language the Legislature must have intended "not only RATIO of assessment," but limitation also, and by implication to have "limited the assessment to the amount of benefit." Elsewhere in the opinion the Court said: "The act must be construed as "if it contained an express limitation of the assessment "to the land benefited and the further limitation OF THE "AMOUNT OF THE ASSESSMENT TO THE BENEFIT RECEIVED. "It follows that IT IS ESSENTIAL TO THE VALIDITY OF AN "ASSESSMENT UNDER THIS PROVISION OF THE CHARTER, THAT "IT AFFIRMATIVELY AND UNEQUIVOCALLY APPEAR THAT "THE ASSESSMENT DOES NOT EXCEED THE BENEFIT."

Again, in *Re* Drainage of Lands, 35 N. J. L., 502, an act authorizing the drainage of certain land provided that, after the completion of the improvement the expense of it should be made up and returned to the Supreme Court in a report, with an outline description of the lands which ought to contribute to pay for said improvement; and that after notice, &c., the Court should "make a rule or "order directing the said commissioners to distribute and

"ASSESS THE AMOUNT OF SAID EXPENSE AND INTEREST UPON "THE LANDS * * * IN PROPORTION AS NEAR AS THEY CAN "JUDGE, TO THE BENEFIT DERIVED FROM SAID DRAINAGE "BY THE SEVERAL PARCELS OF LAND TO BE ASSESSED." Mr. Justice Bedle, delivering the opinion of the Court in the case last cited, speaking of this provision, said: "This "language is susceptible of two constructions: one, that "the whole expense is to be assessed upon the lands, con- "sidering the benefits only so far as fixing the proportion "of the cost each land owner shall pay, whether it actu- "ally exceeds the benefits or not; the other is, THAT THE "BASIS OF THE ASSESSMENT IS THE BENEFITS, AND THAT "EACH LAND OWNER SHOULD BE ASSESSED ONLY TO THAT "EXTENT." The latter construction was declared the better one, because the former construction would render the act invalid under the doctrine of Tide Water Company *vs.* Coster, 18 N. J. Eq., 518, and also because the latter construction was the more natural one. Mr. Justice Bedle further said: "The words 'in proportion to the "'benefit derived from said drainage' may NATURALLY BE "CONSTRUED TO MEAN SUCH PORTION OF THE EXPENSE "AND INTEREST AS WILL BE ACCORDING TO THE BENEFIT "RECEIVED, MAKING THE BENEFIT THE MEASURE OF THE "PORTION TO BE ASSESSED, AND THE AMOUNT NOT TO EX- "CEED SUCH BENEFIT."

In Chamberlain *vs.* Cleveland, 34 O. St., 564, 565, and 567, the act under consideration provided that the cost of a certain public improvement should be assessed "upon "the property benefited thereby," and that the assessment "on the lots or lands to be charged "therewith" should be "IN PROPORTION AS NEARLY "AS MAY BE TO THE BENEFITS which may result "from the improvement to the several lots and "parcels of land so assessed." It was held in the case cited that, under this statute, the special benefits must be "valued" and the assessment limited to them, and that "the whole amount of the assessment is to be apportioned "amongst the several lots specially benefited, IN THE PRO- "PORTION THAT THE SPECIAL BENEFITS TO EACH LOT BEAR

"TO THE WHOLE SPECIAL BENEFITS CONFERRED BY THE IM-
"PROVEMENT."

It was further held that the assessment there in question was void, "on the face of the proceedings," because the report thereon did not contain anything to show affirmatively that the special benefits "were valued at all, "or if valued, to show that the assessment was appor-"tioned in proportion to the special benefits that each "lot received." The Court said also that the statutory provisions on this point must be read and construed in connection with the constitutional limitation upon the power of assessment, and that, so construed, "the impli-"cation from this language is irresistible, that there can "be no assessment where there had been no special bene-"fit conferred, and it is to be implied with equal force "that as such benefits are made the basis of the assess-"ment, it must be limited to the value of the special bene-"fits conferred, and cannot exceed them."

In all the cases above cited, except that of Doyle *vs.* Austin, the statutes under consideration were much less explicit upon the point now in question than the Dupont Street Act. Those statutes might possibly, with some show of plausibility, have been construed to authorize a finding of a mere ratio or proportion of benefits, but they were not so construed. In each case it was held in effect that the assessing board was empowered to find not merely a ratio or proportion of benefits but the actual benefits and the quantum thereof? How much more must the Dupont Street Act be so construed when it expressly provides for an ascertainment and report of the "sum or amount" of benefit?

Compare the statute here in question, for example, with that construed in Chamberlain *vs.* Cleveland, *supra*, where the statute did not expressly require the ascertainment of the "sum or amount" of benefits in any way. Here the statute does explicitly require that very thing. There, all persons were allowed to file any objections they wished to the report of the assessing board. Here that privilege is conferred only upon those feeling them-

selves "aggrieved" by the action of the board "as shown in said report," and they are allowed only to file petitions for an order directing the filing of the report in Court with certain documents and data (Sec. 8). There, the hearing before the confirming tribunal extended to all objections to the report, and that tribunal could give complete relief since it could set aside the report. Here, the confirming tribunal could not hear anything but evidence for and against the filing of the report and the documents or data used in preparing it, and, as a result of such hearing, could only grant or deny the order for such filing, and its ultimate jurisdiction was confined merely to the confirmation of the report or to referring it back to the commissioners for modification. It had no power to set aside the report however defective or unjust it might find it to be (Sec. 8).

Surely if it was necessary in Chamberlain *v.* Cleveland under the act there construed that the assessor should ascertain the amount of actual benefits to each lot and to limit the assessment to the extent of such benefits and the report must affirmatively show such ascertainment and limitation, where the confirming tribunal had such extensive jurisdiction, how much more must it be so here where the County Court had such limited powers and could act only on the face of the report and accompanying documents or data?

Both in *Chamberlain* vs. *Cleveland* (*supra*), and in *Re* Drainage of Lands, 35 N. J. L., 502, it will be observed that the provision for *proportionality* or *relativity* in the assessment was regarded as raising an implication that the assessment could not exceed the actual benefits. If that is a correct doctrine, it applies with equal force to the Dupont Street Act. When in the latter act the Legislature carefully restricted the power of the commissioners to finding the actual benefits to a finding of the "sum or amount of benefits to each lot, "relatively to the benefits accruing to other lots," the implication is as strong certainly as in either of the cases last cited that the intention

was that the assessment should in no case exceed the amount of the benefits.

It is stated in the opinion of the Supreme Court, that the commissioners in making the assessment here in question, certainly did not construe the act as authorizing them to find the fact and quantum of benefits to the lots assessed; and, therefore, that the apparent excess of cost and expense of the improvement over the aggregate benefits, in their report, is of no significance. We must confess our entire inability to understand how that court could have arrived at any such conclusion from the reading of the report of the commissioners. In the caption of their report of benefits the commissioners call it a report "Showing the lands benefited and the *enhanced value* of each subdivision" (Record, pp. 126, 127).

The column in which the benefits are set down in the report is headed on every page as follows: "*Enhanced* "*value* or *amount of benefits* assessed" (Record, pp. 126, 127).

At the close of the report the assessments were added up and the aggregate sum set down as "grand total." (Record, p. 186.)

It is to be noted further that the columns of the report in which the "enhanced value" was set down are also headed with the words: "Dollars," "Cents." And in the judgment of confirmation the figures representing the grades of benefits are set down with the $ before them, thus: "796, 837."

Now, if the commissioners did not intend to find the "amount of benefits" to each lot, why did they place at the head of the column in which their findings of benefits were set down the words, "enhanced value or *amount of benefits* assessed?" Why, if the figures set down in those columns represented a mere *abstract ratio or proportion*, were they set down under the head of "dollars" and "cents"? It is clear that if the figures set down in that column, opposite any particular lot, represented the mere *ratio* in which that lot was benefited as compared with the other, the said sum did not represent dollars and cents

at all. It was a mere abstract number. And, finally, if the finding of the benefits was a finding of a *ratio* and not of the actual benefits what possible sense was there in adding up the figures in those columns and setting down the aggregate as a "grand total"? Grand total of what? Whoever heard of a "grand total" of a proportion or ratio? If the numbers set down opposite the respective lots were mere abstract figures to represent a ratio the summing up of them into a "grand total" was not only meaningless, but it was worse. It was ridiculous and mischievous. It could serve no purpose except to mislead.

But it is said in the opinion of the State Supreme Court that the commissioners could not have intended in the original report a finding of the actual benefits to each lot or the aggregate benefits to the entire district, because they brought out the sum total of the benefits exactly equal to the sum total of the costs and damages and expenses. The learned Judge who prepared the opinion says, in effect, that it would have been something more than a coincidence if the costs and the expenses and the actual benefits had thus come out exactly equal, that it would have been little short of miraculous. But when we come to examine into the facts in the record of this case, the miracle entirely disappears. We find that the equality between the costs, damages and expenses on the one side and the benefits on the other was brought about by a very simple arithmetical process. As originally reported by the experts, the costs and damages incident to the improvement were found to be far below the aggregate benefits. The commissioners after adopting the reports of the experts, in order to overcome this difference and to absorb the entire amount of benefits, allowed, as we have seen, about $20,000 in extravagant and unauthorized expenses, and then added almost $100,000 more for "estimated expenses." To be exact, they set down the estimate of future expenses at $98,935.71. If the commissioners had been really estimating the future expenses, these figures would have indicated the most painstaking exactitude. The odd dollars and cents would have shown a conscientious scrupulousness

with respect to the expenses, which would have been absolutely unparalled in the history of special assessments. But it appears that these odd dollars and cents were necessary to be added to the aggregate costs and expenses of the improvement to bring it up to the "grand total" of benefits ascertained by the experts and adopted by the commissioners. This fact also explains the miracle which so astonished the State Supreme Court. It was no miracle; it was simply nimble and unscrupulous figuring.

(d.) Unless finding of quantum of benefits as well as relative benefits was authorized there was no finding of relative benefits, which of itself avoids the entire assessment.

As we have seen, the commissioners construed the act authorizing them to find the "*enhanced value*" or "*amount of benefits*" accruing to the several lots in the assessment district, and they found accordingly. There is nowhere in their report a finding of "relative benefits," except as such finding can be implied from the finding of actual benefits. So, in modifying the report, the County Court treated the assessment upon each lot as an assessment of the actual benefits and modified it without regard to the assessment upon other lots. If the act did not authorize a finding of actual benefits, such finding in the report as presented and confirmed was nugatory; and if there is no independent finding of relative benefits, the act has not been complied with and the assessment is entirely void. Not only is there no finding in the report, either as originally presented or as confirmed, of relative benefits, except as implied from the finding of actual benefits, but, as we have heretofore shown, the commissioners in making the report and in consenting to the modification to it utterly disregarded all relativity or proportionality in the different assessments. Instead of assessing the different lots upon any uniform plan or theory, they applied a different rule to the assessment of some property from that which was applied to others.

See also cases heretofore cited upon the limitation of the power of assessment to the extent of special benefits.

The only point in this connection as to which there is any conflict, is as to the power of the Legislature to determine conclusively, either expressly or by implication without a hearing, that the benefits equal or exceed the cost and expenses of the improvement. But even upon that point the great preponderance of authority is against the power, especially in the later cases.

Mr. Dillon says that there is a conflict as to whether or not the Legislature can assess the whole cost of such an improvement "upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining, not only that such property is specially benefited, but that it is thus benefited the extent of the cost." He further says that most of the earlier cases sustain the power, but that latterly several courts, "*perceiving that special benefits actually received by each parcel of contributing property, was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive and arbitrary,* have denied the unlimited scope of legislative discretion and power, and asserted what must be regarded upon principle as the *just and reasonable doctrine that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited;* and since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury." 2 Dill. Mun. Cor., 3d Ed., 758-759.

In support of this doctrine the learned author cites a multitude of cases. Referring particularly to the case of Seely *vs.* Pittsburgh, 82 Pa. St., 360, he says that it "must be admitted to be right by all except those who ascribe a practical omnipotence to the legislative power in such matters, a view which overlooks the substantial difference between general taxation and the imposing of a special burden upon particular property, irrespective of political or municipal districts. This distinction is clearly stated

" by Beasley, *C. J.*, in State *vs.* Newark, 37 N J. L., 415, " * * * and the judgment of the Court necessarily " implied that the amount or *proportion of special benefits* " *could not be arbitrarily determined by a legislative act* " *and charged upon the abutters*, but would have to be as- " certained and apportioned in some other mode, as by an " estimate of such benefits to be separately made by a " proper board of officers " (*Id.*, 460, *n.*).

A statute imposing such an assessment without regard to benefits, and without any provision for a hearing on that question, proceeds, of course, upon an assumed equivalency of benefit and cost and is clearly unconstitutional and void under the doctrine above laid down. This has been determined in many cases. In the case of *Re Market St.*, 49 Cal., 549, it was held, that where an extraordinary street improvement had been constructed under an abortive contract, between the municipality and a street contractor, a subsequent statute imposing an assessment to pay for such improvement, without any limitation to actual benefits, was unconstitutional and void. So, an act authorizing the opening of an avenue several miles in length and the imposition of an assessment upon property on both sides of the avenue, within a certain distance thereof to pay for such improvement, without any limitation to the extent of the special benefit, was held unconstitutional in *Washington Ave.*, 69 Pa. St., 352. So, in a case somewhat like that at bar, a statute authorizing the widening of a street by adding thereto a strip on one side, to be paid for by an assessment on property on both sides, without any limitation to the extent of the benefits, was held unconstitutional, although it provided for an appeal to the Common Pleas by any one dissatisfied with the assessment upon satisfactory proof of the injury to the appellant by the original assessment (*State* vs. *City Council*, 12 *Rich. L.*, 702).

So, a municipal ordinance imposing an assessment upon benefited property to pay the entire cost of a public improvement, containing no limitation of such assessment

to the extent of the benefits, was adjudged void in *St. John* vs. *E. St. Louis*, 50 Ill., 96.

In the leading case of Tide Water Co. *vs.* Coster, 18 N. J. Eq., 527, a statute was declared unconstitutional which imposed an assessment upon adjacent property to pay for a local public improvement, without regard to whether the cost of improvement exceeded the benefits to the assessed property or not. In a subsequent case in the same State, a special statute imposing an assessment upon abutting property, to pay two-thirds of the cost of paving the street without regard to the consideration whether the property was benefited to that extent or not, was declared unconstitutional. *State* vs. *Newark*, 37 N. J. L., 415, 424.

In that case Beasley, *C. J.*, said: "The suggestion that "in this class of cases it will be presumed that the bene- "fits equal the burthen imposed until the contrary is "shown, cannot prevail. If well founded it would have "led to a different result in the Tide Water case. (Tide "Water Co. *vs.* Coster.) *The only safe rule is that the statute "authorizing the assessment shall itself fix, either in terms "or by fair implication, the legal standard to which such "assessment must be made to conform. In no other way "can property be adequately protected.*"

The statute must also provide some mode of apportioning the assessment, so that the burden upon each lot or tract assessed shall be in proportion to, and not in excess of, the benefit thereto. Thus a statute authorizing commissioners to assess the cost of a sewer upon property benefited thereby, "in such proportions as they should deem just and equitable," was held invalid in *New Brunswick Rubber Co.* vs. *Commissioners*, 38 N. J. L., 190. This case was followed in *Barnes* vs. *Dyer*, 56 Vt., 469. See also Cooley Tax. (2d Ed.), 642.

Where a special statute provided for an assessment upon benefited lands to pay the cost of draining certain lands and directed that the land should be divided into three classes according to benefits, by certain commissioners, and that the assessment upon each class should not exceed a certain sum per acre, and assessment was made in ac-

cordance therewith, such assessment was held void because of the failure of the statute to limit the assessment to the actual benefits (*Lee* vs. *Ruggles*, 62 Ill., 427). The case of City *vs.* O'Brien, 111 Ill., 533, was not itself one of assessment for benefits, but the principle that the power to impose such an assessment is strictly limited by the extent of the actual benefits accruing from the improvement to the assessed property, is approved, and *Chicago* vs. *Larned*, 34 Ill., 203, is cited as authoritative upon that point.

It is universally conceded that a statute on its face imposing such an assessment upon benefited property, in excess of the benefits, would be unconstitutional and void, but there is not a hair's difference in principle between such a statute and a statute arbitrarily deciding, either expressly or by implication, that the benefit and burden are equal in such a case, or imposing the burden without regard to the benefit or without an opportunity to be heard upon that question. If the Legislature can arbitrarily determine the equivalency of benefit and burden in such a case, or disregard the benefit in imposing the burden, there is absolutely no limit to its power, and it may impose a million dollars assessment upon property not benefited to the extent of one dollar by the improvement.

The question of the fact and quantum of individual and aggregate benefits, and of the sufficiency of the benefits to authorize the assessment in such a case, is obviously judicial and not legislative in its nature (Cooley, Constitutional Limitations, 702–704; *People* vs. *Houston*, 54 Cal., 536; *Isom* vs. *Miss.*, &c., *R. Co.*, 36 Miss., 314; *Brooks* vs. *Mayor*, 48 Md., 267).

It is a question of fact to be decided upon issues properly framed, after a trial and hearing of the evidence pro and con, admitted and applied in accordance with established legal principals and rules, and not a question of public policy or expediency to be determined according to its presumed effect upon the public welfare. It is also essentially a jurisdictional question, since the power of assessment is derived from and limited by the extent of the ascertained

special benefits. Hence, it is not a proper question to be determined by the Legislature at all, much less to be determined arbitrarily and without hearing. At some time, and before some competent tribunal, in some stage of the proceedings before the assessment becomes final, every man whose property is subjected to such an assessment must have his day in court to show that his property is not specially benefited by the improvement or not benefited to the extent of the assessment thereon (*Stafford* vs. *Hamston*, 2 Bro. & B., 691; *Chicago* vs. *Larned*, 34 Ill., 277, and other cases cited *supra*).

In *Stafford* vs. *Hamston*, *supra*, it was held that one whose property was assessed to pay for a sewer was entitled to show that the property was not specially benefited by the sewer, such evidence having been objected to on the ground that the plaintiff's house was within the district comprised within the decree, and that the presentment and decree was conclusive against her. The Court said: "But this depends on the question of jurisdiction; " and the commissioners cannot conclude the party with- " out allowing her an opportunity of being heard. * * * " *In some stage* or other, *the party, who is to bear a* " *burden*, on the ground that he derives, or is likely to " derive a benefit * * * ought to have some opportu- " nity of shewing, that no benefit is or can be derived. " * * * This he has not before the presentment is " made, nor while it is making, nor before the decree; nor " has he any notice of the presentment or the decree, but " by the assessment and notice of such assessment or " demand under it. The effect, therefore. of rendering the " presentment and decree conclusive, would be to decree " against the party unheard, and without allowing him " any possibility of being heard. On general principles " this would be unjust." (See also to the same effect Bow *vs.* Smith, 9 Mod., 94; Neave *vs.* Weather, 3 Ad. & El., N. S., 993.)

Upon the same principles it is clear that each of those assessed for such an improvement is entitled to an opportunity to be heard, to show that the aggregate benefits are

less than the amount of the entire assessment, although his own property may have been benefited to the full extent of the assessment upon it. This is a vital jurisdictional question. A statute awarding an opportunity to be heard merely as to the ratio or relativity of the benefits and assessment upon those assessed in such a case, does not accord that hearing as to the fact and *quantum* of individual and aggregate benefits necessary to satisfy the guaranty of due process (*Albany, &c., Bank* vs. *Maher*, 20 Blatch. 342). In that case the statute provided for the review of such an assessment after its completion upon the single point that the assessment upon the property of any party complaining was "at a higher proportionate valuation than other property on the same row," although there was no express prohibition of a hearing on other points. The hearing on review was, however, held to be implied limited to the single point thus specified, and this was held insufficient to satisfy the guaranty of due process.

Some of the early New York cases extend the limits of legislative power in this particular further than the decisions in any other State. A leading case cited in favor of the power of the Legislature to declare or assume the equivalency or burden or benefit, in a case of this sort, is *Peoplé* vs. *Mayor of Brooklyn*, 4 N. Y., 441. But even in that case it was in effect conceded that the Legislature had no power to impose an assessment of this kind upon property in the vicinity of a public improvement in excess of the actual special benefits accruing to such property from the improvement. The Court there held that in case of such an assessment, "the presumption is, in the absence of evidence "to the contrary, that the benefits exceeded the expenses," and that if not so, the property-owner might show the fact. This doctrine comes very far short of holding that the Legislature can arbitrarily and conclusively adjudge, either expressly or by implication, that the benefits of such an improvement to adjacent property equal or exceed the expense of such improvement, and impose upon such property an assessment to pay the entire expense. But holding even that there is disputable presumption of ex-

cess of benefits over expense in such a case, this decision is contrary to the great preponderance of recent authority. As Judge Dillon says: "The tendency of the latter cases, "especially with respect to local assessments for street "improvements, is to restrict the doctrine of *People* vs. "*Mayor of Brooklyn*" (2 Dillon Mun. Corp., 3d Ed., 611, note).

In the Court below in this case a number of California decisions under statutes prior to this were cited upon the point now under consideration and upon other points relating to the sufficiency of the notice and hearing provided for in this act. It may safely be stated with respect to such cases that so far as they seem to militate against any position taken by us here, they are in every instance based upon statutory provisions differing radically from those of the Dupont Street Act. Thus, in the statutes of 1864, construed in *Piper's Appeal*, 32 Cal., 538, 541, there is no color of support for a contention that the Legislature undertook arbitrarily to determine that the benefits of the improvement would equal or exceed the cost, or to impose the assessment without regard to the extent of the aggregate benefits. Ample notice and ample opportunity to be heard were provided for in that statute, not only before the commissioners making the assessment, but also before the confirming Court, both with respect to the fact and quantum of benefits, as well as concerning all other questions involved.

So in the Act of 1867 and 1868, as amended by the Act of 1870, which was under consideration in *San Francisco* vs. *Certain Real Estate*, 42 Cal., 514, an opportunity for hearing before the assessing board as well as before the confirming tribunal was expressly provided for, and this hearing extended to all questions relating to benefits as well as all other questions. Besides, there was no question in *San Francisco* vs. *Certain Real Estate* of any arbitrary adjudication by the Legislatnre of the equivalency of the aggregate benefits and aggregate costs and damages, and no such question was decided in that case.

If the Legislature has the power, here claimed, of arbitrarily and conclusively determining without notice or opportunity for a hearing on the part of those assessed, that all the property in a district of its own selection will be benefited by a proposed public improvement to the extent of its entire cost and impose upon such district an assessment to pay the whole of such cost, there seems to be practically no limit of its power in such cases. It may impose an assessment upon property not at all benefited by the improvement. It may do so, too, even though the district selected is so small as to embrace only the property of a single person. Nay, more, the power claimed necessarily involves the power of determining in the same arbitrary and conclusive manner the aggregate benefit and aggregate cost of such improvement. How otherwise can it determine whether benefit will equal or exceed the cost or not? The power claimed involves also power to determine the fact and *quantum* of individual benefits. It is idle, indeed, to say that the power of assessment in such cases is dependent upon, or limited or measured by the actual benefits, if the Legislature can thus disregard the limitations of the power at pleasure, and impose an assessment without regard to benefit.

If the construction of this act by the State Supreme Court is correct the Legislature here not only arbitrarily determined that the district therein defined would be benefited at least to the extent of the entire cost of the improvement therein authorized, but afterwards provided for an equally arbitrary exemption of half the district, and the imposition of an assessment upon the residue to pay for a part of the improvement. This, we submit, the Legislature clearly had no power to do, unless, indeed, there is no limit to its authority over such an assessment. In *People* v. *Lynch*, 51 Cal., 23, it appeared that in an ordinary frontage assessment one lot had been omitted. The Legislature afterwards passed an act to validate the assessment notwithstanding the omission. The Court, in the case cited, held that the Legislature could not do so, saying: "This act, at best, is an attempt directly to levy a contri-

" bution within a certain district; to declare that each " lot named shall pay a sum, arbitrarily fixed, as its por- " tion thereof, and that particular lots shall pay nothing."

The principle of that decision applies here. If the Legislature, as there held, after fixing an assessment district, cannot in the same or a different act arbitrarily exempt a portion of the district and impose the burden of the assessment upon the residue, neither can it, in the same or a different act, arbitrarily exempt a portion of a district previously formed and impose any portion of the assessment upon the residue. It was the arbitrary exemption and imposition and not the extent of the imposition which rendered the subsequent act void in *People* v. *Lynch*, *supra*, and the same features exist here if the construction of the State Supreme Court is correct. We submit, also, that upon the construction, the provision in this act for exemption from the assessment part of the defined district and for assessing upon the residue the cost of a corresponding portion of the improvement, was an attempt at a partial apportionment of the assessment. If the Legislature could arbitrarily assess upon a selected district the cost of a specified improvement and then assess upon part of the district the cost of a corresponding part of the improvement, why might it not, in the same arbitrary fashion, apportion the entire assessment among the lots assessed, and dispense with the commissioners entirely ?

9. ORDINARY FRONTAGE ASSESSMENTS AND OTHER ASSESSMENTS DISTINGUISHED AS TO THE POWER OF THE LEGISLATURE TO IMPOSE THE SAME WITHOUT LIMITATION TO ACTUAL BENEFITS.

Certain California decisions upholding the power of the Legislature to assess the entire cost of a street improvement in a city upon property abutting the improvement in proportion to frontage without limiting the assessment to the extent of actual special benefit to the assessed property were cited in the Court below in support of this act (*Chambers* vs. *Satterlee*, 40 Cal., 497; *Whiting* vs. *Townsend*, 57 Cal., 515, and other cases). We maintain that

such cases are entirely distinguishable from a case of this sort, and that the Dupont Street Act, construing it as imposing the assessment without any express or implied limitation to the extent of the actual ascertained benefits, may be held unconstitutional without overruling the class of cases above mentioned, in the class of cases referred to, which for sake of convenience, may be termed "frontage cases," the assessments are always imposed on urban property of equal depth fronting upon the proposed improvements, and the improvements are of the ordinary kind bestowed from time to time upon city streets for their preservation and betterment. The distinction between such cases and that now under consideration is clear and marked, both in principle and upon the authorities.

An ordinary frontage assessment, though limited to a single street or even a small section of a street, may well be regarded as forming a part of a general scheme or plan for improving and preserving all the streets of the city, since as the city grows and increases in wealth and commerce, it will inevitably become necessary in the course of time, to impose similar assessments for similar improvements upon all the other streets. In effect, therefore, it is as if a general assessment or tax were imposed ratably upon all property of the city for the improvement of all the streets, since in principle it can make no difference whether the work is all done at once under a single general statute or is done in sections under different statutes, from time to time, at longer or shorter intervals, as demanded by the growth of the city. There is, therefore, no necessity of limiting any particular assessment to the extent of the actual special benefits to the assessed property. And, as the assessed property all equally front upon the improvement, it may be well presumed, conclusively presumed, that every lot will be benefited by such improvement in exact proportion to the extent of its frontage thereon, so that there is no possible necessity for limiting the assessment upon any lot to the extent of the actual ascertained benefit accruing thereto from the improve-

ment, or for laying down any other rule or measure of apportionment for the assessment, than that it shall be distributed according to frontage.

The distinction between such an assessment and a special extraordinary assessment like this, not levied exclusively upon frontage lots is fully and clearly shown in the able and exhaustive opinion of Mr. Chief Justice George in *Macon* vs. *Patty*, 57 Miss., 405. The same distinction is recognized and approved in *Washington Ave.*, 69 Pa. St., 357; *Seely* vs. *Pittsburgh*, 82 *Id.*, 360; *Chamberlain* vs. *Cleveland*, 34 Ohio St., 551; *Tide Water Co.* vs. *Coster*, 18 N. J. Eq., 518; *Taylor* vs. *Palmer*, 31 Cal., 240; *People* vs. *Lynch*, 51 *Id.*, 20: and in many other cases; also in 2 Dillon Mun. Corp., 3d Ed., 755-759, heretofore cited.

The constitutionality of statutes imposing ordinary frontage assessments is maintained in States which adhere most firmly to the doctrine that the Legislature has no power to impose an assessment to pay for an extraordinary improvement like this, upon property in a designated district in the vicinity of such improvement without any limitation of such assessment to the actual special benefits to the assessed property, and without an opportunity to be heard upon that question. It is so in Pennsylvania as is shown in *Washington Ave.*, 69 Pa. St., 357, one of the most valuable and cogent authorities on this point. In that case the Court says: "This case presents a new ques-"tion upon the power of taxation; the authority of the "Legislature to compel the owners of farm lands, lying "within one mile on each side of a public highway, to pay "for grading, macadamizing, and improving it, by an as-"sessment upon their lands by the acre. * * * It "is not the case of taxation by frontage, for the "lands of the plaintiffs * * * do not abut upon the "avenue, but merely lie within the prescribed lines of "taxation." Then after showing how the practice of local taxation grew up and was justified like the ordinary frontage assessment, by equalizing the burden in course of time "as every portion of the State makes its own im-

"provements," the Court further say: "This practice "was followed by another advance. * * * In cities "and towns where population was dense the authorities "began to make improvements of special advan- "tage to certain of the citizens at their expense. "* * * Here, too, * * * our notions of private "right were not violated; for the advantages to the own- "ers were so clear * * * that the burthen was duly "compensated, and again equality was produced as each "street or alley came to be paved." Then they said that, as applied to the case on hand, the mode there adopted "cannot with any degree of truth be pronounced to be a "proper substitute for a just and impartial valuation of "benefits. This needs no reasoning to make it plain. "* * * If unreasonable and not a fair substitute for a "valuation made by a disinterested tribunal, acting accord- "ing to the law of the land, then it plainly is not within "the principle of the many decisions, in this and other "States, recognizing the per foot frontage rule as a fair "mode of measuring the benefits, and is consequently not a "legitimate method of assessment upon the adjacent farm "lands. I admit that if we do not analyze the reason and "trace the origin of the frontage rule, there is a seeming "analogy. * * * But reasoning by analogy is some- "times a dangerous source of error, and is always so, if we "fail to see that the analogy itself is correct." The opinion goes on to show that the seeming analogy men- tioned is imperfect, and that the statute in hand attempted to make certain landowners pay for an improvement in which others not assessed were equally interested, and continues: "It is found by the Master, and if it had not "been * * * it is perfectly obvious, that this avenue "will be one of general public benefit; and specially that "it will be of great convenience and individual benefit to "citizens and taxpayers beyond the limit of taxation "along the road, both laterally and terminally. "* * * This brings it within the principle "limiting the assessment to the extent of the "special benefit clearly conferred." It is further

stated in the opinion that it was fortunate that the parties resisted the assessment in question, because it led to an inquiry into a power fast running wild by insensible degrees and would prevent the building up, step by step, of wrong precedents. That the Court did not dispute the propriety of the exercise of the power within the exact limits already sanctioned by long usage, but that they must meet and overthrow departures beyond those limits, which must land in the complete overthrow of the right of private property. "Should we now," say the Court, "suffer this law to pass without * * * con-
"demnation, upon a false analogy of the frontage rule "* * * we should leave open a door for future "impositions." The doctrine of *Washington Avenue*, "with respect to extraordinary assessments, is approved and applied in many subsequent Pennsylvania cases, which, at the same time, expressly or tacitly concede the entire validity of ordinary frontage assessments and of the statutes imposing them (*Seely vs. Pittsburgh*, 82 Pa. St., 360; *Sawmill Run Bridge*, 85 *Id.*,168; *Philadelphia vs. Keith*, 2 Atl. Rep., 207; *Protestant Orphan Asylum's Appeal*, 111 *Pa. St.*, 135).

In Ohio, New Jersey and other States which firmly uphold that doctrine that the power of special assessment in cases of extraordinary improvements like this is dependent upon, and limited and measured by the extent of the actual benefits accruing from such improvements to the assessed property, as shown in the authorities heretofore cited in the brief, we find abundant decisions maintaining frontage assessments with equal vigor (*State vs. Fuller*, 34 N. J. L., 227; *City vs. Society*, 4 Zab., 385; *State vs. Blundell, Id.*, 403, and other adjudications referred to in Cooley on Tax., 2d Ed., 644; 2 Dillon on Mun. Corp., 3d Ed. 754–769, and in notes thereto).

In other States both frontage assessments and extraordinary assessments, not limited to the extent of actual benefits, are equally condemned (Chicago *vs.* Larned, 34 Ill., 203; Peay *vs.* Little Rock, 32 Ark., 31; Taylor *vs.* Chandler, 9 Heisk., 349).

The California frontage cases, therefore, afford no obstacle whatever to a decision against the constitutionality of the Dupont Street Act, if it is to be construed as arbitrarily declaring that the benefits to the assessment district therein defined would equal or exceed the cost of the entire improvement. The strongest of the California cases are *Whiting* vs. *Townsend* 57 Cal., 519; *Chambers* vs. *Satterlee*, 40 *Id.*, 497. But neither of them goes so far as some of the cases upon the same subject in other States in which the imposition of extraordinary assessments like this, without limiting them to the extent of actual benefit to the assessed property and without hearing upon that point, is vigorously condemned.

The distinction between such extraordinary assessments and frontage assessments was noted by Mr. Justice Field, as early as *Burnett* vs. *Sacramento*, 12 Cal., 83. Subsequently, notwithstanding the cases in that State upholding frontage assessments, it was decided, *In re Market Street*, 49 Cal., 549, that a statute arbitrarily imposing upon adjacent property an assessment to pay for a street improvement previously constructed under an abortive city contract, without limitation to the extent of the actual benefits to the assessed property, wasun constitutional and void. Thus showing that in the Courts of that State, as well as elsewhere, the distinction between extraordinary special assessments and frontage assessments, is well defined.

There are other classes of assessments which constitute real exceptions to the rule that the power of assessment for improvements and reparations is dependent upon and bounded by the special benefits resulting from such improvements and reparations to the assessed property. Of this class are assessments for the reclamation of wet lands, for the construction of levees, &c. Such assessments are not referable to the power of assessment for special benefits (Cooley Taxation, 2d Ed., 582–591; *Tide Water Co.* vs. *Coster*, 18 N. J. Eq., 518; *Wurts* vs. *Hoagland*, 114 U. S., 606; *Head* vs. *Amoskeag*, &c., *Co.*, 113 U. S., 22; *People* vs. *Hagar*, 66 Cal., 59).

The distinction between assessments for the reclamation of swamp lands and assessments based upon benefits is clearly pointed out in *Tide Water Co.* vs. *Coster*, *Wurts* vs. *Hoagland*, *Head* vs. *Amoskeag, &c., Co.*, *supra*. It is an obvious distinction. The special benefits resulting from the draining of wet lands is necessarily confined to the lands in the immediate vicinity, and only the owners of such lands are at all interested in such an improvement. Whether the cost of it exceeds the benefit to those lands or not, there is no reason for imposing any part of the cost upon any one else. If an improvement is made at all, it is right and just that it should be made at the expense of the lands benefited by it. All that individual owners of such lands can justly require is that the cost shall be apportioned among them in exact ratio to the actual benefits accruing to each particular tract or lot. If they are afforded an opportunity to be heard upon that question, they are afforded due process of law, and if by chance any particular tract of land within the assessment district in such a case is not, in fact, benefited by the improvement, of course it ought not to be assessed, and a hearing upon that point also is essential. These points are well decided in *Reclamation District* vs. *Goldman*, 65 Cal., 635; *Reclamation District* vs. *Hagar*, 66 *Id.*, 54; same case, 111 U. S., 711. In the latter of these cases it was held that a reclamation assessment must be apportioned among the parcels of land assessed according to the relative benefits. In Reclamation District *vs.* Goldman, *supra*, it was held further that in such a case a tract of land not benefited could not be assessed. As was tersely said in the case: "It would be the height of "injustice to put a charge upon land upon a surmise "or theory that it is or would be benefited, when the fact "is established that it is not and would not be benefited. "* * * If no benefits, no assessments must be charged "on the land."

It is clear that assessments of the character last mentioned, as well as for other improvements, the entire benefit of which is confined to the assessed property, may

well be upheld without infringing upon the doctrine that, as to assessments to pay for improvements manifestly beneficial to the public as well as to those assessed, the power of assessment is strictly dependent upon and bounded and measured by the actual benefits to the assessed property, and to each parcel thereof. Decisions upholding such assessments of the former kind stand in the books side by side with decisions against the constitutionality of the statutes imposing assessments of the latter kind, without limiting them to the extent of the actual benefits. It is so in New Jersey. While the limitation of the power of assessment to the extent of the actual benefits, in cases of special assessment like that here in question, is vigorously maintained in Tide Water Co. *vs.* Coster, 18 N. J. Eq., 518, exceptional assessments for building school-houses and the like, not depended upon or limited to the actual benefit, are upheld with equal firmness (State *v.* Fuller, 39 N. J. L., 586, and other cases).

III.

Nature of the proceedings in the County Court and rules of laws applicable to judgment of the character of that of the County Court here.

The County Court in confirming the assessment here in question was exercising a special statutory and very limited jurisdiction derived from the Dupont Street Act. It is said by the State Supreme Court that the County Court was a constitutional court, and so it was in the sense that by the Constitution it was given jurisdiction of special proceedings. There was, however, no general law on that subject or regulating such matters. The Dupont Street Act was a special act. It was applicable only to the particular writ here in question. It had no application to any other street or to any other proceedings, and without the Dupont Street Act there was no existing law under which the County Court could have taken any step

in connection with this or any other street improvement. There was no law of California outside the Dupont Street Act to which the County Court could look either to get jurisdiction of this proceeding or to regulate its exercise after getting jurisdiction. Nor is there any common law of special proceedings which could be invoked to that end. The act itself at the end of Sec. 21 says that if the supervisors pass the resolution then all *proceedings thereafter* shall be taken *under the provisions of this act*, and it admits of no doubt, we think, that this act is to be looked to as the sole guide and chart to be followed in the proceedings and the sole source of the power exercised therein.

In this case the County Court was acting as a special statutory commission, not as a court. (Dorsey *vs.* Barry, 24 Cal., 452; *Re* Canal Street, 11 Wend., 154; *Re* Mount Morris Square, 2 Hill, 14; Visscher *vs.* Hudson R. R., 15 Barb., 37.)

The Dupont Street Act followed in its provisions as to process the Montgomery Avenue Act, the assessment under which was declared void in Mulligan *vs.* Smith, 59 Cal., 206, and in Zeigler *vs.* Hopkins, 117 U. S., 683.

Those decisions could not have been made upon any other theory than that the jurisdiction as to the particular proceeding was limited to that which the statute conferred.

It is well settled in California, as well as in other jurisdictions, that a Superior Court of law, when exercising a special statutory jurisdiction, not proceeding according to the course of the common law, is to be deemed a mere statutory tribunal, and that its jurisdiction is bounded by the express terms of the statute, and must be exercised in strict accordance with it. (San Francisco, &c., Co. *vs.* Alameda, &c., Co., 36 Cal., 644; Dorsey *vs.* Barry, 24 *Id.*, 449; Whitney *vs.* Delegates, 14 *Id.*, 503; Chollar, &c., Co. *vs.* Wilson, 66 Cal., 374; Williamson *vs.* Berry, 8 How. U. S., 495; Rogers *vs.* Dill, 6 Hill, 417; Leary *vs.* Fletcher, 1 Ired. L., 261; Jennings *vs.* Stafford, *Id.*, 407; 7 Rob. Pr., 104, and other cases there cited.)

There is no presumption in favor of the judgment of

even the highest court, when acting under such a special statutory authority; but it is always open to collateral attack, not only upon ordinary jurisdictional grounds, but also upon the question of compliance with the statute. (Williamson *vs.* Berry, 8 How. U. S., 495; Galpin *vs.* Page, 18 Wall., 371; San Francisco *vs.* Talbot, 63 Cal., 489; Baker *vs.* Lorillard, 4 N. Y., 266; Pulaski Co. *vs.* Stuart, 28 Grat., 879; Lavin *v.* Emigrants Bank, 18 Blatch., 29–32; 15 Am. L. Reg., 212.)

There is an overwhelming and unbroken array of authority in favor of the doctrine that under a statute authorizing a special assessment, like that in question here, jurisdiction to make or confirm such assessment, whether conferred upon a special tribunal created by statute or a court, is strictly limited within the express provisions of the statute, which constitutes the only source and measure of the jurisdiction, and cannot be extended beyond those limits by presumption or intendment.*

This is indeed but an application of the general and familiar rule, as old as any in the books, that a special statutory authority or jurisdiction, not proceeding according to the course of the common law, upon whatever tribunal it may be conferred, is bounded by the statute conferring it, which must be strictly and narrowly construed and followed. (Wells' Juris., Sec. 10, *et seq.;* 7 Rob. Pr., 67, 107 to 109; Chollar, &c., Co. *vs.* Wilson, 66 Cal., 374; Williamson *vs.* Berry, 8 How. U. S., 495; Denver R. R. Co. *vs.* Otis, 7 Col., 198; Guisebert *vs.* Etchison, 51 Md., 478, 487; Folger *vs.* Columbian, &c., Co., 99 Mass., 274; Aud. Gen. *vs.* Pullman, &c., Co., 34 Mich., 59.)

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* 2 Desty Tax., 1241; Cooley Tax., 2d Ed., 526, 609; Mulligan *vs.* Smith, 59 Cal., 206; Clapp *vs.* Hartford, 35 Conn., 73; Same case, *Id.*, 222; People *vs.* Otis, 74 Ill., 384; State *vs.* Perth Amboy, 29 N. J. L., 261; State *vs.* Road Com., 41 *Id.*, 89; Semon *vs.* Trenton, 47 *Id.*, 489; Doughty *vs.* Hope, 3 Den., 594; *Re* Mt. Morris Square, 2 Hill, 14; Hogan *vs.* Baker, 2 E. D. Smith, 22; Weeks *vs.* Lyon, 18 Barb., 531; *Re* Lange, 85 N. Y., 307–310; *Re* Department Public Parks, *Id.*, 463; Craig *vs.* Andes, 93 *Id.*, 413, 414; *Re* Manhattan R. R. Co., 102 *Id.*, 302; Same case, 6 N. E. Rep., 590; Chamberlain *vs.* Cleveland, 34 Ohio St., 551; State *vs.* Fond du Lac, 42 Wis., 287; State *vs.* Bayonne, 49 N. J. L., 311; Albany City Bank *vs.* Maher, 20 Blatch., 341, 342; Zeigler *vs.* Hopkins, 117 U. S., 683.

In this case the jurisdiction of the confirming court, being merely revisory or quasi appellate, it is clear that unless the commissioners, who ostensibly made the assessment, had the jurisdiction and power to do so, the confirmation of it was of no avail. The County Court could not validate it if the commissioners had not such jurisdiction. It had no power to determine conclusively the jurisdiction and authority of the assessing board. If the assessment was void for want of jurisdiction in the commissioners, it remains void notwithstanding the confirmation. Affirmance never validates a void judgment, and, therefore, no appeal from such a judgment is necessary. (Whitley *vs.* Black, 11 Am. Dec., 753; Fitzhugh *vs.* Custer, 51 *Id.*, 728.)

And so a void assessment can not be cured or validated by confirmation. (Mulligan *vs.* Smith, 59 Cal., 206; Kahn *vs.* Supervisors, 79 Cal., 388; Doughty *vs.* Hope, 3 Den., 594; *Re* Widening Broadway, 49 N. Y., 150; Zeigler *vs.* Hopkins, 117 U. S., 683.)

So, even though the statute declares such confirmation to be conclusive. (People *vs.* Brooklyn, 71 N. Y., 495; People *vs.* Wilson, 119 N. Y., 515.)

It is conclusive only in favor of an assessment within the jurisdiction of the assessing board (Hassan *vs.* Rochester, 67 N.Y., 536.)

Substantial defects remain open to collateral attack, after the confirmation, as well as before. (Lembeck *vs.* Mayor, 30 N. J. Eq., 556.)

Indeed, as is said in the case last cited, the confirmation of such an assessment not only does not cure substantial defects, but confirms them.

Unless there was jurisdiction to make the assessment there can be no jurisdiction to confirm it. Defects in the jurisdiction either of the original assessing board or of the confirming tribunal are always open to inquiry in such a case notwithstanding the judgment of confirmation and without regard to the recitals in such judgment. (See Woodman *vs.* Auditor, 52 Mich., 28; Detroit *vs.* Highway, 34 Mich., 37; Doughty *vs.* Hope, 3 Den., 598;

Thompson *vs.* Ingham, 14 Q. B., 716–717; 7 Rob. Pr., 16–19.)

No court exercising a mere statutory and limited jurisdiction, nor indeed any other court, can acquire jurisdiction by merely saying that it has it. (Kelly *vs.* Bemis, 4 Gray, 83; Mulligan *vs.* Smith, 59 Cal., 236, and cases there cited.)

Nor, in a case of this sort, can a court acquire jurisdiction or enlarge its jurisdiction by an erroneous construction of the statute. (7 Rob. Pr., 107–109; Wise *vs.* Withers, 3 Cranch, 331; Boswell's Lessee *vs.* Dickerson, 4 McLean, 262; Wood *vs.* Stanberry, 21 Ohio State, 142.)

Not only is it admissible, in a case of the exercise of a special statutory authority, such as that which is here under consideration, to show that the steps necessary to confer jurisdiction have not been taken, but it is also admissible to show that the court or tribunal has exceeded its jurisdiction, for excess of jurisdiction is just as fatal as want of jurisdiction (7 Rob. Pr., 67, 107; Windsor *vs.* McVeigh, 93 U. S., 274; U. S. *vs.* Walker, 109 U. S., 258; Wise *vs.* Withers, 3 Cranch, 331; Folger *vs.* Columbian, &c., Co., 99 Mass., 274; Chamberlain *vs.* Cleveland, 34 Ohio State, 561; State *vs.* Fond du Lac, 42 Wis., 287; *Re* Lange, 85 N. Y., 307; Craig *vs.* Andes, 93 *Id.*, 413; Cagwin *vs.* Hancock, 84 *Id.*, 532.)

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 144.

W. M. LENT, ET AL.,

Plaintiffs in Error,

vs.

CHARLES TILLSON, TAX COLLECTOR OF THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant in Error.

In Error to the Supreme Court of the State of California.

MR. CHOATE'S BRIEF FOR PLAINTIFFS IN ERROR.

JOSEPH H. CHOATE,
For Plaintiffs in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890,

WILLIAM M. LENT *et al.*,
Plaintiffs in Error,

vs.

CHARLES TILLSON, Tax Collector of the City and County of San Francisco,
Defendant in Error.

No. 144.

MR. CHOATE'S BRIEF FOR PLAINTIFFS IN ERROR

First Point.—The fact that Bryant, one of the Commissioners, was an interested party, which does not appear upon the face of the statute, but is admitted in the pleadings (Record, pp. 48 and 74), presents a fatal and incurable objection to the act and all proceedings under it being considered for a moment as due process of law.

(*a.*) No man can be a judge in his own cause, or a commissioner to assess benefits and damages to property of which he is himself an owner. Bryant, the Mayor, was half owner of one of the lots in the assessed district, which was actually assessed.

(*b.*) This objection is radical and incurable. The act names the Mayor as Commissioner, and contains no provision for supplying the place of an interested and therefore disqualified member of the Board, or for proceeding without him. It is therefore void, and incapable from the beginning of being put in operation, and all proceedings under it are necessarily void.

(*c.*) Neither was there any possible relief for the property owners on this score in the County Court. For the County Court had no power to set aside the assessment or to declare the proceedings void *ab initio*. It could only modify, and as modified, confirm. When all the modifications directed by it have been made it is bound to confirm. Neither could the objection be waived.

(*d.*) The impossibility of imputing any validity to a judicial or *quasi* judicial proceeding, in which a member of the tribunal is an interested party, or regarding it in any aspect as due process of law, is established by uniform and overwhelming authority.

Cooley Const. Lim. (4th Ed.), *410-413.
Oakley vs. *Aspinwall*, 3 N. Y., 547.
State vs. *New York*, 1 Dutch, 405.
State vs. *Crane*, 36 N. J. Law, 398.
People vs. *Gies*, 25 Mich., 83.
Regina vs. *Cheltenham*, 1 Ad. & Ell. (N. S.), 467.
Regina vs. *Justices, &c.*, 6 *Ibid.*, 753.
Regina vs. *Aberdare Co.*, 14 *Ibid.*, 854.
Wells Jur., § 419.
Vide Principal Brief, p. 51.

Second Point.—The act on its face does not provide for due and adequate notice and hearing for the parties to

be affected, having in view the nature and object of the proceedings, and so it operates to deprive them of their property without "due process of law," and is void under the Fourteenth Amendment.

(*a.*) The labored argument in the opinion of the Supreme Court of California attempts to sustain its validity against this objection, by incorporating into the notice prescribed, all the detailed provisions of the act itself, which, if permitted, plainly dispenses with the necessity of any notice whatever, except the statute, a doctrine which never has been, and never with any show of reason or justice can be, applied to special assessment cases.

Record, p. 336: "The sufficiency of the notice will depend to a very considerable extent on the nature of the proceeding *and the statute on which it is based.* The statute is always presumed to be known, and whether the notice really affords the necessary information and gives the party whose interests are affected an opportunity to be heard, must depend largely on those provisions."

P. 342: "*Of course, unless the notice required can be helped out by reference to the statute it amounts to nothing.* It is true it is not required to be addressed to any one especially. It informs no one what property is to be affected. It indicates no steps to be taken by the person aggrieved to obtain redress, and mentions no tribunal before which, or any time or place at which his grievance, if he have any, can be heard."

This novel doctrine lies at the root of the decision appealed from, and if sustained completely wipes out the distinction which has hitherto been uniformly recognized and maintained between general tax cases and special assessment cases, and will hereafter dispense with any notice whatever to the property owner of the proceedings under a statute by which his property is to be taken or charged.

(*b.*) Without requiring personal notice as in judicial

proceedings, and assuming that notice by publication will in such cases suffice, we insist that such published notice must come up to a certain standard of what is reasonably practicable having in view the purpose intended. It must at least "*amount to something*," without reference to the statute or to anything outside of itself. It must be adapted to the nature and circumstances of the particular case. Regard must be had to the cause and object of the taking. It must be just to the parties to be affected; must be adapted to the end to be attained and must be one by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and afforded an opportunity to defend. It must certainly be directed or addressed in some way to the parties to be affected, so as to be reasonably likely to attract their attention. It must also indicate in some way the property affected, and the court or tribunal which is to pass upon the rights of the parties, and some time and place at or within which they may apply for a hearing or relief.

There was no urgent public or political necessity in this case as in a general tax case, for ignoring these fundamental requirements and essential rights.

Where notice by publication is properly and legally substituted for personal notice, it is always on the ground that personal notice is not practicable, but this can never be a reason for dispensing with the essential features and elements of fair notice; on the contrary, it is the very reason for requiring them all, because in a published notice it is always entirely practicable to insert them all. Necessity for a change in the mode of reaching the party constitutes no necessity or reason for omitting from the notice conveyed by the substituted method the cardinal elements of what is notice.

Vide Principal Brief, p. 71, &c.

(*c.*) Notice that the report of the commissioners is open

at their office for the inspection of the parties interested, which is all the notice prescribed by the act, does, in truth, "amount to nothing," in the language of the Supreme Court of California.

It is not to be directed to the parties interested, or to anybody in particular. In such a case notice to all the world is notice to nobody.

The same Court, in *Boorman* vs. *Santa Barbara*, 65 Cal., 313, had itself decided that a similar notice required by a similar act was in this respect no notice, because "not addressed to any particular person or class of persons, or which would inform any particular person that on failure of appearance any burden would be imposed upon him or his property."

The Court below, however, sought to distinguish this case from that by the distinction that in that case the act did not precisely fix the limits of the assessment district, while it claimed that this act does, and therefore the parties to be assessed, *by reading the act in connection with the notice*, would be informed that the notice was addressed to them as clearly as if it were directed to them by name or as a class.

But in the first place, the present act does not absolutely and precisely fix the limits of the assessment district, because by its terms two distinct districts were described by boundaries as contemplated to be possibly "benefited"; both, or either or neither of which might be in fact benefited or concerned according to circumstances—in the one district in which the property of the plaintiffs in error was included, only in case a majority of the property owners therein should not protest, while in the other district only in case such a majority should petition. In fact only the former district was affected, because the owners in the other did not petition.

This difference between the two acts, therefore, if it raised any distinction as to the need of a notice addressed to the parties to be affected, would rather require information by the notice to the owners in

the district between Bush and Market streets that they and not the owners in the other district were the parties interested. Hence, even if the act is to be read as part of the notice, it would not be a notice to those to be affected; it would be notice to those who under the act might not be affected in common with those who were. It would still be notice to everybody, and therefore to nobody. It wholly fails of the true and necessary nature and object of a fair notice, viz , to attract the particular attention of the party to be affected—as distinguished from all other parties—to inform him that he or the class to which he belongs is or are the party or parties to be affected; so that observing the address he may go on and read what follows and so really receive the notice intended to be given.

But, in truth, the distinction attempted to be set up between the form and nature of the notice required to be given under an act which does fix the limits of an assessment district and one which does not, is in this respect a distinction without a difference. It assumes that a citizen owning property, in order to preserve it, is bound to read all published notices, whether addressed or unaddressed, which is a manifest absurdity.

Vide Principal Brief, p. 72, &c.

(*d.*) Again, the provision for notice in Section 7 is plainly insufficient to constitute due process of law, because in its substance it is not to be notice of any pending or future proceeding, and is to indicate no tribunal, time or place for a hearing or in which opportunity is to be afforded the parties interested to appear and defend their rights. This is the fundamental object of notice within all the authorities. A party cannot be heard unless he have a reasonable notice of the time when and the place where and the tribunal in which judgment may go against him. No statute can provide for due process of law to the property owner

which casts the burden upon him to hunt for himself for these important facts. It is his right to be informed of them by actual or constructive notice, and in the one case as in the other such information is equally and entirely practicable.

The notice provided for in Sec. 7 is more meagre and empty than those which have been condemned as insufficient in many leading cases. There is nothing required to be inserted in it which was calculated even to raise the suspicion in the mind of a property holder that it was intended as "process" to bring him before any tribunal whatever, or that there were to be any future or further proceedings whatever, by which his right might be affected. The only tribunal required to be mentioned in the notice is the Board of Commissioners, which body could afford him no hearing. Its labors were completed. It could, under the statute, afford him no relief. For aught that was to appear in this notice the whole business of the assessment had been completed, and was not further open for consideration.

Vide Principal Brief, p. 76, &c.

(*e.*) Once more the notice provided by Section 7 is fatally defective as "process of law," because, even meagre as it is, its publication is not required to be made at any time before all right to apply for relief accorded by the next section to the property owner shall have completely expired. By that section thirty days only after the filing of the report was allowed for the filing of petitions by parties aggrieved. No time is prescribed by the act for the publication of notice to begin, but if no petition is filed within these thirty days from its filing the report is to become absolute. It would be a literal and exact compliance with the requirements of the act if the publication should begin after the expiration of these thirty days, and the test of validity in such cases is not what has actually been done but what may be done under the statutory

provision in question. The statement required to be inserted in the notice, that "the report is open for inspection at the office of the Commissioners," would have been just as true after the expiration of the thirty days as while they were running, and in either case the reader of the notice might well assume that the assessment had become a finality and that nothing more was possible to be done.

Vide Principal Brief, p. 77.

(*f.*) But the fundamental proposition upon which the Court below relies to make this notice sufficient as process of law, viz., that it is to be read as if the act were incorporated in it, based upon the imputed presumption that these particular property owners know, that is, that they are to take notice of all the detailed provisions of the act, is utterly without warrant upon principle or authority.

By Section 23 the act is to take effect from its passage, not from its publication, and no publication of it is provided for. By Section 21 the Board of Supervisors at any time within sixty days after the passage of the act, that is to say, immediately after its passage, may set the proceedings in motion by passing this resolution of approval. By Section 6, "as soon as convenient," that is to say, immediately after the passage of the Supervisors' resolution provided for in Section 21, the Commissionrs are required to publish a notice for not less than ten days, not to the parties who are to be benefited and assessed and are to pay for the improvement, but to those whose property is sought to be taken or injured, that the Board is organized and inviting them to present to the Board maps, &c. But by Section 7, without waiting for the running of these ten days, or any part of them, the Board may immediately make and sign their report, and such report, *as soon as the same* is completed, shall be left at the office of the Board.

Thus, with literal and full compliance with the

requirements of this statute the assessment may be completed and the report filed within a space of time, after its passage, the shortness of which is not measured or limited by the statute, and is less time than that within which the most diligent property owner could practically get news of its passage. The notice of filing may begin the next day.

It is in such a case as this that the Court below, conceding the utter worthlessness of the notice in itself, ekes it out by writing between the lines of it the entire body of the act, as a practical illustration of the maxim that every man is presumed to know the law.

To apply such a maxim to such a statute is a mere travesty of justice. It has no application, anyway, to a limited and local statute, and can work nothing but injustice, when sought to be applied to a local statute, which can thus execute itself before the parties to be affected by it can reasonably be expected to have heard even of its passage, much less to have learned of its detailed provisions as to future proceedings, which are thus sought to be incorporated into the published notice.

The question is of the constitutionality of the Act. The objection to the constitutionality is, that it takes away property without providing notice to the owners of the proceedings to be had under it, by which such taking is to be accomplished. The argument in support of the constitutionality is, that the passage of the Act itself is notice of the proceedings to be had under it, and is itself, though never published, a part of every notice however empty, that is published under it. In other words, the argument is that the Act itself is notice; is due process of law without further notice or process. And so the enactment of the statute takes away the property of the citizen without notice. The question of the constitutionality of the statute is thus simply begged. It is contended that because this statute is a law, those who are

affected by it must be presumed to have known of its contents, and because they are presumed to have known of its contents, therefore it must be a law.

Vide Principal Brief, p. 77.

(*g.*) But reading the Act as part of the notice does not remedy either of the radical defects in the notice prescribed by the seventh section which have already been pointed out.

It could not supply the want of any address or direction in the notice to the parties sought to be affected, which is essential to make it a notice at all as to them.

Again, it could not remedy the defect in the notice of information to the property owner as to the time and place when and where he might have a hearing upon proceedings by which his property is to be affected. All the procedure between the filing of the report and the final confirmation of it is provided for by Section 8, and the complete incorporation of that section into the notice would not inform him as to any tribunal, time or place in or at which he was to or could appear and defend his rights.

It would only inform him that if he felt himself "aggrieved by the determination of the board, as shown in the *said* report"—that is, the report as already completed and filed—*he* might apply by petition to the County Court for the limited relief presently to be considered, but how, when or where he was to be heard in answer to the petition of any other party, which, if granted, would certainly affect his own rights, or where, when or how he was to be heard in answer to the application of the board for the final confirmation of the report, he would get no inkling of information from the notice and Section 8 together, and this for the excellent reason that no such right to appear and answer in either of those cases is given to him at all.

Besides, as the statute does not fix the time within

the thirty days after the filing of the report at which other property owners should file their petitions, but leaves that entirely to the option of the several petitioners; and as the statute does not fix the time when and place where the Commissioners shall apply for the final confirmation of the report after the thirty days, nor the time when the County Court shall hear or act upon such application, either of which times may be months or even years after the thirty days, the notice to be published, even assuming the eighth section of the Act to be in it, cannot be construed to cite the party to either such hearing, even if a right to be heard on either such matter could be spelled out of the statute. Notice of an opportunity for a hearing which leaves the time of such hearing dependent upon the option or caprice of other parties, is certainly in no sense "due process of law."

(*h.*) Nor does reading the Act with the notice remedy the defect that the notice is not required to be published or constructively served before the expiration of the thirty days after the filing of the report, nor the objection that the notice, if process at all is process emanating from one tribunal and returnable to it for the purpose of conferring jurisdiction upon another distinct tribunal. The only possible hearing which the act provides for is in the County Court. The only notice provided for is of the completed acts of another tribunal which is powerless for the future in the premises, and makes no allusion to the County Court.

Vide Principal Brief, p. 80, &c.

Finally, on this distinct point of the sufficiency of the notice as process, it is obvious that the Legislature did not regard the notice prescribed by the 7th section as adequate process of law to bring the parties before the County Court to attend upon further proceedings. For upon the filing of any petition of an

aggrieved party, a copy of it is required to be served upon one of the members of the Board. This is process adequate to bring the Commissioners in ; but, on the theory of the Court below, everybody is already in the County Court for all purposes of complete jurisdiction from the time of the publication of the notice.

BUT, SECONDLY :

The statute provides for the parties to be assessed *no hearing whatever upon the merits*, either before the Board or before the County Court, either upon their own several petitions or upon the application of the Board for final confirmation; and so, as to the matter of hearing, is utterly destitute of every element of due process of law.

Vide Principal Brief, p. 83, &c.

(*a.*) Absolutely the only right given to the property owner who shall feel himself aggrieved by the action of the Board, as shown in the report as first completed, is to petition the County Court for an order requiring the Board to file its report with the Court, with the documents and data in the custody of the Board, and used by it. No petition for relief upon the merits can be presented or considered. Issue is to be joined and heard upon the petition for the filing of the report and documents in Court and upon that alone. The Court is only authorized to allow said order or to deny the same, and this in its discretion. If granted the only relief obtained is that the Board obeys the order to file in Court its report and the documents. This is the only result of the petitions of all parties aggrieved contemplated and provided for by the Act.

If no such petition is filed within the thirty days the only difference is that the Board itself shall thereafter, at such time as it shall choose, without notice to anybody, present the report to the Board without the

documents, and petition that the same be approved and confirmed. There is no provision for anybody being heard on this petition. Power is then given to the Court to approve and confirm the report, or to refer it back to the Board with directions to alter or modify the same in the particulars specified by the Court, and to keep referring it back until such orders are complied with, which being done, the Court must confirm and approve it. There is no provision for a hearing of anybody on these material and vital proceedings, nor has the Court any power to vacate or set aside the report as wholly void, illegal or fraudulent. It can only confirm or modify.

We submit that the only opportunity thus provided for the aggrieved property owners, not upon the merits, but upon the mere formality of filing the report with the documents and data in Court, is not 'due process of law;' that no clause or word can be implied into the statute beyond its express terms for the purpose of enlarging the hearing accorded; that upon this point the rule of strict construction must upon all the authorities be applied to the statute, especially in a case like this, where no hearing upon the merits was ever had by any property owner.

(*b.*) The hearing provided for, such as it is, is only appellate or revisory, and after the liability of those assessed has become *prima facie* fixed. The entire *onus* of preventing the assessment thus fixed from becoming conclusive, is thrown upon the property owners. This does not constitute that hearing upon the merits which is involved in the guaranty of due process of law.

Vide Principal Brief, p. 89, &c.

Even if new evidence could be admitted upon the hearing in the County Court, and if the hearing could extend down to the confirmation of the report, it was still merely revisory or appellate. The whole tenor of

the statute shows the intention that, if no opposition should be made, the report, as first made, should be confirmed. There is no provision for a reassessment by the County Court. Modification in specified particulars only is allowed. The statute makes no provision for setting it aside.

Vide Principal Brief, p. 91, &c.

(*c.*) But upon no just construction of the eighth section can any hearing upon the merits or upon vital questions going to the validity of the assessment be tortured into or out of it. Even after the report, with the documents and data, are before the Court, the hearing is necessarily limited to defects "shown in the report." It could not extend to such questions as the constitutionality of the act, to the sufficiency of the resolution of the Supervisors, or of the notices published under Sections 6 and 7, or to the secret frauds of the Commissioners, for nothing relating to these matters is to appear upon the face of the report or of the documents and data in the custody of the Board and used by it in making the report.

(*d.*) The failure to give the County Court any power to set aside the report altogether upon any ground or upon all grounds is fatal to the claim that this statute and the proceedings under it constitute due process of law. The Court is necessarily limited to the exercise of the specific powers conferred by the act—expression of those excludes all others. It is plain, therefore that it could not hear or determine any questions that went only to the validity of the entire assessment. The jurisdiction of the Court is necessarily limited to the powers expressed.

In re Department Public Parks, 85 N. Y., 463.

In re Lange, *Ibid.*, 307.

In re Mt. Morris Square, 2 Hill, 14.

Albany Bank v. *Mayer*, 20 Blatchf., 341.

In all these cases the same rule of statutory construction must be applied, whether the question before the Court is of the conclusiveness of the adjudication or assessment, or as to the constitutionality of the act in providing for a hearing sufficient to satisfy the guaranty of due process.

In the case of *Mulligan* v. *Smith*, 59 Cal., 206, involving the constitutionality of the "Montgomery Avenue Act," upon which the present act was modeled, it was held that under the statute "the County Court could exercise only such jurisdiction as was expressly conferred upon it, and that because the statute did not expressly authorize it to do so, it could not hear or consider or decide questions going to the entire validity of the assessment." And this Court, in *Zeigler* v. *Hopkins*, held the same thing as to the same assessment.

Vide Principal Brief, p. 95, &c.

(*e.*) Again, it is a fatal objection to the sufficiency of the hearing provided for by Section 8, that it is left to the *discretion* of the County Court, no matter what testimony is brought or right established, to allow or deny the only application which the aggrieved property owner is permitted to make, for the filing in Court of the documents and data in the custody of the Board and used by it in making the report. Especially as the final application for the confirmation of the report could not extend beyond what appeared on its face, and on these documents and data it was essential to justice that the right to the filing of these in Court being established should not still depend upon an exercise of discretion. "Legal judgment" cannot be written into the statute in place of the word "discretion," as was insisted in the opinion of the Court below. The Court, by the exercise of its "discretion," might restrict the hearing, if any, upon the question of confirmation or modification to what appeared upon the face of the report itself.

(*f.*) Due process of law required that each property owner should be heard upon every proposed modification of the report as filed, as well as upon the question of final confirmation—and no such right is given by the statute.

As every change that will increase the damages awarded to any one property owner, or diminish the assessment found against any one property owner will necessarily increase the assessment found against every other property owner, the right of all to be heard on every change as to any must appear incontestable.

Lowell vs. *Wentworth*, 6 Cush., 222.
Gilkerson vs. *Scott*, 76 Ill., 510.
Vide Principal Brief. p. 98, &c.

The claim made below that because the right is given to all to petition, the statute, therefore, must be construed to give all the right to appear and contest the petition of every other is not tenable. It is only when aggrieved by determinations shown by the original report that any one can petition. There is certainly no provision for contesting changes made upon the petition of others, which changes do not and cannot appear on the face of the report.

It was also claimed by the Court below that because there is no clause prohibiting others to appear in answer to the petition of an aggrieved property owner the right to do so may be implied.

But the statute does especially provide who shall appear and answer any petition for modification. It is the Board, and no other, and unless some new principle of interpretation is to be invented for the purpose of this particular case, this is tantamount to an express provision that no other party shall have a right to be served with the petition or to answer or contest the same.

(*g.*) There is the same necessity in justice and fairness for a notice to the property owners and a hearing for

them upon the question of the final confirmation of the report. After all the modifications made upon the application of all whose petitions are considered the report becomes in all respects a new report. The ratios and proportions are changed, and everybody's interest is affected. The report after modication changes the burden of the assessment upon any lot affected by it.

In New York it has been held, under the Act of 1813, that, after all the modifications upon separate objections, a new notice and a new hearing are required upon the question of final confirmation.

March v. *Portchester*, 71 N. Y., 309.
Vide Principal Brief, p. 110, &c.

But the language of this statute absolutely precludes any hearing upon the application for final confirmation, for after all modifications have been made "the said Court shall then approve and confirm said report." This is imperative upon the Court, and forbids any hearing upon the question.

It is really conceded by the Court below, that the construction of the statute according to the rules we contend for, which are the rules always heretofore followed in such cases, is simply farcical. It *is* farcical, because it fixes a lien upon property without any real notice, and without any real bearing upon the merits, and therefore we submit it is an unconstitutional statute.

Vide Principal Brief, p. 110, &c.

(*h.*) Finally, it is claimed that not only must the statute be carried into the notice prescribed to make it amount to anything in the way of due process, but worse still, that the constitutional provision for "due process of law" must be read also as a necessary part of the statute, so as to imply a right to a hearing, not given by its terms, *in order to save it from invalidity.*

But clearly if this could be done, no statute ever

could be held invalid for not providing a hearing, and so this invaluable constitutional guaranty would be practically abolished.

Vide Principal Brief, p. 59, &c.

Third Point.—But, assuming the act not to be obnoxious to the constitutional objection presented, the proceedings of the Board and of the County Court under it did, in the grossest and most glaring manner, operate to fix this enormous lien upon the property of the plaintiffs in error without due "process of law."

Under this head the facts found by the trial Court, upon which it pronounced the proceedings void as not constituting "due process of law," *are of the last importance.* These facts are not disturbed or modified by the Supreme Court, which reversed the judgment of the trial Court. They are set forth in full in the principal brief, to which we refer.

(*a.*) From beginning to end of the proceedings there was no judicial or *quasi* judicial action by the Commissioners under the act, and no hearing or opportunity for a hearing afforded to the property owners in respect to their proceedings. All of the proceedings of the Commissioners, up to the completion and filing of their report, were secret, arbitrary and non-judicial. And all the subsequent proceedings modifying such original report were in like manner secret, arbitrary and non-judicial, and were besides, by way of mere trade and barter with certain favored property owners, to the extreme prejudice of the plaintiffs in error, and were fraudulent, and with no hearing or opportunity for hearing to the plaintiffs in error.

By the 7th section of the act, it was the duty of the Commissioners themselves to ascertain the damages and the benefits. Their personal judgment was to b

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the foundation of the lien to be assessed. But instead of that they substituted the judgment of unsworn experts, whom they instructed to conduct their proceedings in secret, and without the knowledge of the parties to be affected, and then, without any original examination or judgment of their own, accepted the reports of the experts in all things as correct, adopted in all respects the estimates and valuations of the experts and took them as their own.

Finding XVI., p. 120.

Vide Principal Brief, p. 26, &c.

Thus there was no real judgment exercised by the Commissioners, but their functions in making the original report were completely abdicated—delegated to the experts, who were forbidden to allow any hearing or notice or even knowledge of their proceedings to the property owners.

(*b.*) The experts in making their appraisement and valuation of damage and benefits, and the Commissioners in taking them as their own, adopted a false rule of valuation, by which more than three times the actual value was awarded for the land taken, and omitted from their estimate of benefits to the same lots about two-thirds of the actual benefits, and in so doing committed not a mere error of judgment, but an obvious and palpable fraud, which could only have been intended as such.

Finding XXI., p. 128.

In respect to this the Supreme Court in its opinion says (p. 354): "It is averred that the Commissioners *wilfully and intentionally* determined the value of lots taken to be more than three times as much as they in fact were, and omitted from their estimate of benefits to the same lots about two-thirds of the actual benefit. *This overestimate of damages and underestimate of benefits, so far as I can judge*

from the statement of the case in the record, seems to be fully sustained." "The report showed fully what the estimates were, and *the injustice was so obvious that a mere inspection by those familiar with the property * * * could not fail to disclose the facts.*"

Thus a false, unequal, oppresive and arbitrary rule was adopted by the experts, two of whom were speculating in the very property, and by the Commissioners one of whom was interested as owner in the property. This action, obviously fraudulent, went to the root of the whole matter, vitiated the entire proceedings, and was cause for setting aside and not merely modifying the report. For this the County Court had no power, and certainly upon this as a ground for vacating the entire proceedings the property owners had no opportunity to be heard.

The adoption of such a false, fraudulent and arbitrary rule of valuation, as the basis of the entire proceedings, leaves the assessment always open to collateral attack, and is a plain case for the equitable remedy by injunction.

Vide cases cited on Principal Brief, and especially—

Cooley Taxation, 2d Ed., 218, 248, 710.
Balfour vs. *Portland*, 28 Fed. Rep., 739.
Vide Principal Brief, p. 39, &c.

This intentional omission of benefits and fraudulent overvaluation of damages is in all respects tantamount to the intentional omission of property included in an assessment district, which is always held to render the assessment void after confirmation.

People vs. *Lynch*, 51 Cal., and other cases cited in Principal Brief.

(*c.*) But the subsequent proceedings of the Commissioners, by which the original report was modified to the grievous detriment of the plaintiffs in error, are

equally fatal to the proceedings, being regarded as due process of law. They were not only secret, arbitrary, non-judicial and oppressive, but were in the highest degree fraudulent.

The findings of the Court, XXV. to XXXI. inclusive, pp. 130-135, establish that when certain aggrieved property owners filed their objections in the County Court to the report of the Board, and proposed and threatened to contest the same for various matters, the Commissioners *to induce them to withdraw their objections and without notice to the property owners affected* by said assessment, and especially without notice to the plaintiffs herein, entered into an arrangement with said objectors by which said objectors agreed to withdraw their said objections. That by this secret arrangement the assessment upon the property of the objectors was reduced some $95,000, and the damages awarded to them increased some $17,000. That this was done by mere consent and barter without any judicial action or consideration by either the Board or the County Court, in the absence of the other parties to the proceedings and without any notice to them, and the order of the Court for these modifications was made by consent and not till the 19th of December, the day before the final confirmation, "without proof, consideration or investigation." That these changes were all made for the *sole* purpose of inducing the objectors to withdraw their objections, *and to prevent an examination of the report on its merits*, and without any disclosure to the Court of the circumstances or of the motives that influenced the Commissioners in consenting to the same.

Vide Principal Brief, p. 28, &c.

That in making these changes, a different rule was adopted and applied to the property of these objectors from that which was applied to the rest, to the detriment of the latter in more than $100,000, "and all equality and uniformity of assessment upon the vari-

ous lots and subdivisions assessed was destroyed" (p. 133).

That to induce one other objector to withdraw his objections, the Commissioners entered into an arbitration with him. The arbitrators adopted the true and honest rule of valuation of the property taken for the widening, finding it to be $246,240 instead of $639,913, as found in the report, and so reducing his assessment from $97,308 to $39,653, to which the Commissioners agreed and carried it through in the some manner as before, but left the assessment as it stood in the report as to all others, and as to this "the plaintiffs had no notice or opportunity to be heard as to the contest" (p. 135).

Vide Principal Brief, pp. 40, &c.

Thus, the making of these changes, by which special objectors were favored, and all uniformity, equality and relative valuation in the assessment was utterly destroyed, was not only accomplished without notice and hearing, but without any judicial action, or consideration, as a mere barter between the objectors and the Commissioners. The latter, in adhering to the original report as to all other property owners, sinned with their eyes open, for in the Blythe case they were informed of, and as to him abandoned, their glaring fraud.

Moreover, the cardinal injunction of the statute, Section 7, that the benefits to each lot shall be found relatively to the benefits accruing to other lots of land within the designated district which, if it means anything, requires a *uniform* rule of valuation, was ignored and openly violated.

That a mere trade and barter is not a substitute for a real judgment of the tribunal by whose action property rights are to be affected needs no argument or authority.

Vide Principal Brief, p. 39.

That a judgment or assessment procured by fraud vitiates the whole proceeding is equally certain.

And an intentional and wilfull violation of the cardinal rule of equality prescribed by the statute is equally fatal.

All these were grounds for vacating the whole report which the County Court had no power to do.

Earl of Bandon vs. *Becher*, 3 Cl. & F., 509.
Johnson vs. *Milwaukee*, 40 Wis., 326.
Merrill vs. *Humphrey*, 24 Mich., 175.
Spring Valley Water Co. vs. *Schottler*, 110 U. S., 354.
Spring Valley Water Co. vs. *San Francisco*, 82 Cal., 286.
Rex vs. *Commrs.*, 7 East, 71.

And especially

Windsor vs. *McVeigh*, 93 U. S., 278.
U. S. vs. *Walker*, 109 U. S., 267.

As to decrees or orders entered by consent by some parties to a cause being a nullity as to all others, *vide*—

Kelly vs. *Milan*, 21 Fed. Rep., 868.
Gaines vs. *Relf*, 12 How., 472.
Gay vs. *Parpart*, 106 U. S., 679.
Ensminger vs. *Powers*, 108 U. S., 292.

(*d.*) The further fact found by the Court below that the Commissioners (Finding XXII., p. 129), after estimating *in full* the costs and expenses which could properly arise, which was all that the act, Section 7, authorized them to assess for, *arbitrarily* added thereto, under the head of estimated expenses, the sum of $98,935.21, for the obvious purpose of absorbing this difference between the "benefits and the damage already found," and the further fact (Finding XXXVII., p. 139) that they, by the issue of bonds, increased the assessment nearly another $100,-

000 above the benefits or the damages, are equally fatal to the proceedings as due process of law. Of this last fact it was impossible for the property owners to have notice of hearing. Both these illegally added amounts are inseparable from the rest of the assessment, which is for the face of the bonds issued, and both were framed for a total vacating of the assessment which the County Court had not power to do.

Vide Principal Brief, p. 12 and p. 20.

(*e.*) The only answer attempted to the objections thus far made, that the plaintiffs might have obtained relief against them in the County Court, is wholly untenable. It is false in fact. They had no notice nor hearing except upon the absurd theory that they must be regarded as in the County Court at all times from the publication of notice of filing the report until after its final confirmation.

(*f.*) The actual proceedings in the County Court as found by the Court below utterly invalidated its proceedings and deprived them of the character and quality of due process of law. Besides the many other violations of law set forth in the principal brief, the two following are necessarily fatal:

1. There was a fatal lapse in the continuance of the proceedings from December 8th to December 15th, so that even upon the outrageous assumption that the plaintiffs had notice and hearing up to that time they had none thereafter.

2. But the finding is (Finding XXVI., p. 132, and XXXII., p. 136), that after the entry of the consent order, by which the report was, on the 19th of December, ordered to be modified in favor of favored objectors, and the report was referred back to the Commissioners for that purpose, the further hearing of the whole matter was continued until the 22d of December. *But the Commissioners, apprehending*

that objections would be made to the report as ordered modified, and to avoid further threatened objections thereto, having made the alterations in said report required by the order of the County Court, reported the same back as modified on the 20th of December, *with a petition for confirmation;* and although the proceedings had been on the 19th regularly continued to the 22d, the Commissioners *on the same day,* the 20th, procured the final confirmation of the report *two days* before the time to which it had been adjourned, and this *ex parte* and without notice.

Even conceding the absurd theory that the property owners must be assumed to be in the County Court all the time after publication of notice of filing the report, here they were dismissed from Court on the 19th to depart and come again on the 22d, and not before, and yet on the 20th, behind their backs and in the dark, all their rights are foreclosed, and this gross and crowning fraud like all the rest is sought to be dignified with the high sounding title of "*due process of law.*"

Vide Principal Brief, p. 45, &c.

(*g.*) The XXXVIII. finding of fact (p. 136) is conclusive upon this Court on this writ of error.

Whatever may be held as to the sufficiency of the statute as affording the *possibility* of due process of law, this finding shows conclusively that from the time of the filing of the original report, the whole proceedings were arbitrary and non-judicial, by bargain and consent, without notice or hearing, or proof or consideration by the Commissioners or the Court; and that *instantly* upon the modified report being presented it was finally confirmed, *ex parte*, and so, in fact, the plaintiffs' property was subjected to this enormous assessment without due process or any process of law.

Fourth Point.—The assessment being, on its face, in excess of the actual benefits ascertained, and found as prescribed by the act, was void for want of jurisdiction and due process; because the power of the Legislature to assess at all in cases of this kind is dependent upon and limited by the special benefits to the assessed property.

The record shows the actual assessments to be more than $200,000 in excess of the benefits ascertained and reported. If the act authorized this it is obviously void. If it did not authorize it, then the assessment is necessarily void.

Vide the overwhelming authorities cited upon the Principal Brief, p. 112, &c.

These authorities establish also that, in the case of such excess, the whole assessment is null and void, especially where, as here, in the mode of levying the assessment, the excess is wholly indistinguishable from the residue of the assessment which might have been lawful.

(*a.*) Under this statute the Commissioners were authorized and required to find the actual fact and quantum of benefits. The enhanced value of each lot was to be made the only basis of assessment upon it. The language of the statute is really incapable of any other construction. The Legislature does not attempt to determine the amount of the benefit to the benefited district, as was done in *Spencer* vs. *Merchant*, 125 U. S. It leaves it to the Commissioners to ascertain by their report the aggregate amount of benefits to the entire district, by ascertaining the enhanced value of each lot, which intrinsic enhancement of value to each lot must, of course, in a fair valuation, be also relative to the benefits accruing to other lots of land in the designated district. There is no provision that the aggregate of the enhanced values shall equal the cost and damages, or shall be ascertained or reported to be equal to the cost and damages. Separate findings of the enhanced values and of the costs, damages and expenses having been provided thus to be made, the

act proceeds *ex vi termini* to put a lien for the total damages, costs and expenses upon the several lots in the assessed district. "The assessment, however, shall be adjusted and distributed according to the enhanced values of the respective parcels of land as fixed in the final report of the Board." Sect. 13. But as the aggregate "enhanced values" are not provided to be equal to the aggregate costs, damages and expenses, "*according to*" in this section, can only mean "in proportion to."

The record shows that the "enhanced values" as originally found by the Board and reported did actually exceed the aggregate cost, &c., and to make them equal the Commissioners added to the ascertained costs, expenses and damages the sum of $98,000 for anticipated incidental damages. But by the various modifications made from time to time, the aggregate enhanced values were reduced to $796,837, while the aggregate costs, damages and expenses were increased to $914,991, and thereupon, presumably under the authority of Section 9, the Board issued the million dollars of bonds, being for such an amount as should be necessary to pay and discharge the costs, &c. Thus an excess of about $200,000 of assessment in excess of the benefits is levied upon the assessed district, the benefits being determined *not by the judgment of the Legislature, but by the Commissioners*, and we confidently submit that no authority can be found for sustaining such an assessment so made as being by due process of law.

Fifth Point.—In addition to the point made in the principal brief as to the lack of constitutional power in the Legislature, by mere enactment, without a hearing, to decree the fact and *quantum* of benefit and to assess therefor, we make this point:

That if the doctrine laid down by a majority of this Court in *Spencer* vs. *Merchant*, 125 U. S., shall constrain it to hold that such power does exist and that an assessment laid by such an act as the law of New York there in question, was by due process of law, yet the Legislature must itself do it, as in that case, by an actual levy by statute for the amount of the benefit found by the same legislative act.

The Legislature cannot, as has been attempted in this case, define a designated district as benefited, provide for the ascertainment by commissioners of the actual benefits, and the actual damages, and for the assessment by the commissioners of the amount of the damages *in whatever excess of the benefits.* Such a procedure by legislation is directly condemned by all the authorities recognized by this Court in *Merchant* v. *Spencer*, and in many other cases.

Sixth Point.—If we have succeeded in satisfying the Court either of the unconstitutionality of the act, or that in the proceedings under it the property of the plaintiffs has been taken without "due process of law," there is no force in the claim made by the Supreme Court to maintain its decision by the extraordinary provision of Section 22 of the act that the completion of the work shall be deemed an absolute acceptance by all owners affected of the lien created by the act, and shall operate as an absolute waiver of all claim against the city, and shall be regarded as a contract between said owners and the holders of the bonds and the city.

Of course if the act is invalid, this extraordinary section falls with the rest.

If the act is held to be valid, but the proceedings under it invalid and void because not according to due process of law, the same result follows as to the

effect of Section 22, for in that case no lien is created by the act and no debt is authorized to be created by the act.

Cooley on Taxn., 2d Ed., pp. 465, 556, 558.
Spurlock vs. *Dougherty*, 81 Mo., 183.
McCready vs. *Sexton*, 29 Iowa, 397.
Allen vs. *Armstrong*, 16 Iowa, 513.
Scott vs. *Brackett*, 89 Ind., 419.
Cooley Const. Lim., 4th Ed., 455.
Dingey vs. *Paxton*, 60 Miss., 1053.
Lembeck vs. *Mayor*, 30 N. J. Eq., 557.
Cairo and Fulton R. R. Co. vs. *Parks*, 32 Ark., 145.

In either respect the whole scheme of the 22nd Section, to enact a forfeiture of property rights, and to manufacture a contract for parties *in invitum*, is itself beyond any possible scope of legislative power, and if carried into effect deprives the parties of their property without "due process."

And so it has been uniformly held by the highest authorities.

Thus the real and only question presented by the record for the consideration of the Court is the Federal question arising under the Fourteenth Amendment which we have attempted to argue.

Seventh Point.—The judgment of the Supreme Court should be reversed and that of the Superior Court affirmed, with costs.

JOSEPH H. CHOATE,
For Plaintiffs in Error.

FILED,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1890. No. 144.

W. M. LENT et al., Plaintiff in Error,

vs.

CHARLES TILLSON, Tax Collector, Defendant in Error.

In Error to the Supreme Court of California.

BRIEF OF DEFENDANT IN ERROR.

JOHN MULLAN,
A. H. GARLAND,
H. J. MAY,
For Defendant.

IN THE

Supreme Court of the United States.

October Term, 1890. No. 144.

W. M. LENT ET AL., PLAINTIFF IN ERROR,

vs.

CHARLES TILLSON, TAX COLLECTOR, DEFENDANT IN ERROR.

In Error to the Supreme Court of California.

BRIEF OF DEFENDANT IN ERROR.

This action was originally commenced by the plaintiffs, in the Superior Court of the city and county of San Francisco, to enjoin the defendant, as tax collector, from collecting a tax levied against their property, under and by virtue of the Statute of the State of California, of March 23, 1876, found in the printed volume of the Statutes of 1875–76, p. 433, *et seq.* Upon answer filed, a trial was had, and the Superior Court rendered judgment as prayed for in favor of the plaintiffs (Rec., 148–9). On appeal to the Supreme Court of the State that judgment was reversed, and final judgment in favor of the defendant ordered to be entered. From this judgment the plaintiffs sued out a writ of error to this Court.

Certain holders of "Dupont Street Bonds," issued under

the act here in question, intervened and defended in the case (Rec., 25 *et seq.*), but it is not necessary to notice this further, as the case now appears before this Court. There is quite an array of errors exhibited in the record by the plaintiffs (Rec., 369–74), but at last the only question claimed to be presented is, was that which is complained of done without due process of law, as contemplated in and by the Fourteenth Amendment of the Constitution of the United States? The defendant in error, nearly three years ago, moved this Court to dismiss the writ of error herein, or to affirm the judgment below, but that motion was postponed till the hearing of the cause, and properly the matters arising on the motion to dismiss should be considered in the beginning.

This Court cannot look into the evidence in the record for any purpose whatsoever. The judgment of the Supreme Court of the State ordering judgment to be entered for the defendant necessarily proceeded solely upon the pleadings and findings of fact. That Court, in a cause on appeal, has *no jurisdiction to find any fact;* but the findings of the Court below (Superior Court) are conclusive, unless attacked by motion for a new trial, or some other proper proceeding in the Court below by the *losing party.* The plaintiffs, neither in the Court below nor in the Supreme Court of the State, did or could attack the findings. They are, therefore, conclusive in this Court; and in reviewing the alleged errors, this Court is confined to the pleadings and findings of fact.

In order the better to understand this position of the defendant in error, a brief synopsis of the statute in question, of the pleadings and of the findings and decision of the Court is necessary.

The statute above referred to was enacted for the purpose of widening *Dupont* street, one of the principal thoroughfares in the city of San Francisco. Its essential provisions are as follows:

§ 1. Subject to the provisions of the act, the width of Dupont street is increased to seventy-four (74) feet.

§ 2. The cost of widening the street is to be assessed upon the district described in the act as benefited by the widening.

§ 3. The district benefited by the improvement is described.

§ 4. The Mayor, Auditor and Surveyor of said city and county are constituted a Board of Commissioners to perform the duties imposed upon them by the act.

§ 5. Contains minor provisions with reference to employing assistants for the Board, renting an office and the like, which have no bearing on this case.

§ 6. After the passage of the resolution mentioned in § 21 of the act, the Commissioners are to publish a notice for ten days in two daily newspapers, informing property owners on the street that the Board is organized and inviting them to present maps of their property and statement of their title.

§ 7. The Board of Commissioners are to make a written report containing an assessment of the damage done to each piece of land taken or injured by the widening of the street, also an appraisement of the benefit to each parcel of land in the district declared by the act to be benefited by reason of the widening of the street, relatively to the benefits accruing to other lots of land within said district.

"*Such report, as soon as the same is completed, shall be left at the office of said Board daily, during ordinary business hours, for thirty days, for the free inspection of all parties interested, and notice that the same is so open for inspection for such time and such place shall be published by*

said Board daily, for twenty days, in two daily newspapers printed and published in said city and county."

§ 8. Any person interested, feeling himself aggrieved by the action or determination of the Board, as shown in their report, may, at any time, within the thirty days, mentioned in § 7, apply by petition to the county Court for relief. Upon the hearing, the Court may grant the relief prayed for, and may ultimately approve and confirm the report.

§ 9. The Commissioners are to issue bonds of the city and county for an amount sufficient to pay the damages, costs and expenses fixed in the report finally confirmed by this Court.

§ 10. Parties to whom damages are awarded may accept bonds in payment thereof.

§ 11. If parties damaged fail to take bonds in payment, the bonds may be sold and the proceeds applied to the payment of the damages.

§ 12. Within thirty days after the last publication of the notice mentioned in § 6, a majority in value of the property owners may protest against the widening and thereby arrest it.

Note.—This section has no application in this case, as there was here no protest.

§ 13. Provides for the levy and collection of an annual tax for the payment of the interest and principal of the bonds.

§§ 14, 15, 16, 17, 18, 19 and 20 relate to the details of assessment, the manner of conveying title to the city and county, the removal of buildings from the street, the grading thereof, and the like, and have no possible bearing on this case.

§ 21. "The Board of Supervisors of the city and county of San Francisco are hereby authorized, if, in the judgment of said Broad, it should be expedient that Dupont street be widened in accordance with and in the mode prescribed by this act, to express such judgment by resolution or order in such form as they may deem advisable, within sixty (60) days after the passage of this act; and, in the event that said Board of Supervisors within said period of sixty (60) days after the passage of this act, should fail to pass an order or adopt a resolution declaring it expedient to widen Dupont street under the provisions of this act, no further proceedings shall be had or taken under this act for any purpose whatever, and said street should remain of its present width. But, if said board pass such a resolution, then all proceedings thereafter shall be taken under the provisions of this act."

§ 22. "The completion of the work described in this act shall be deemed an absolute acceptance by the owners of all the lands affected by this act, and by their successors in interest, of the lien created by this act upon the several lots so affected; and it shall operate as an absolute waiver of all claim in the future upon the city and county of San Francisco for any part of the debt created by the bonds authorized to be issued by this act, and their successors in interest. This shall be regarded as a contract between said owners and the holders of said bonds; and said statement and this provision shall be stated on the face of the bonds."

§ 23. The act is to take effect immediately.

The complaint by Lent and other plaintiffs in error contains, in substance, the following allegations (Rec., 1-16:

§ 1. That the defendant is tax collector of the city and county of San Francisco.

§ 2. That the plaintiffs are the owners of the lands described in the complaint.

§ 3. That the lands owned by the plaintiffs are situate within the district described in the above stated statute.

§ 4. That the Board of supervisors did not pass the resolution or order expressing its judgment as to the expediency of the improvement in question, provided in § 21 of the act. That none of the property owners on Dupont street, between Filbert and Bush streets, ever petitioned for the widening of Dupont street.

(*Note.*—This averment as to the lack of a petition is unimportant in this case, as Dupont street between Filbert and Bush has never been widened, and the improvement was confined to that part of Dupont street which lies between Market and Bush.)

§ 5. That the Board of Commissioners, though wholly without authority, proceeded to act as such Board under the provisions of said act; but said Board did not at any time publish the notice to property owners required by § 6 of said act, or any notice in that behalf.

§ 6. That said board prepared the report provided for by § 7 of the act. That the same was completed on the 23d day of September, 1876, and was filed by the board with the County Court on the 23d of October, 1876.

§ 7. That each of the lots taken for the widening of Dupont street was a portion of a larger lot owned by the same person, and the taking of each of the lots was, in fact, taking thirty (30) feet of depth from their rear; yet the commissioners in fixing the value of the land to be taken, treated it as of the same value as a front lot of merely thirty feet, and estimated its value at about two hundred (200) per cent. greater than it in fact was, and knowingly, willfully, and intentionally ascertained and determined the value of the lands taken worth more than

three times as much as they in fact were; by reason of which the cost of the improvement was made three times as great as it ought to have been.

§ 8. That the commissioners in ascertaining the benefits, willfully, knowingly, and intentionally adopted a false rule for their ascertainment—one which was neither equal nor uniform. That they did not consider the lots taken as rear lots, but as front lots, and willfully and intentionally omitted from their estimate of benefits to the lots on the west side of the street about two-thirds of the actual benefits derived by them respectively.

§ 9. That in fixing the ratio of benefits, the board willfully and knowingly adopted a false rule for their ascertainment, in this: That they computed the sum of increased value of the property after widening, instead of upon the increase in value thereof. That the effect of the adoption of this rule was to make the various assessments for benefits unequal, and wholly wanting in uniformity. That this was well known to the commissioners, and the same was intentionally done by them.

§ 10. That after the commissioners had estimated in full all the costs and expenses which could properly or at all arise in the widening of the street, they arbitrarily and illegally added thereto the sum of $70,935.00, and knowingly and willfully included in their estimate of the expenses that sum. That the commissioners so negligently and carelessly managed their affairs that the whole or the greater part of this sum was misappropriated and lost.

§ 11. That there was no publication of notice that the report was open for the free inspection of all parties interested, as required by § 7 of the act, and that the notice required by § 7 of the act was never published in

two daily papers for twenty (20) days, as therein provided.

§ 12. That at different dates, between the 5th and 25th of October, 1876, William Sharp, Theodore Meetz, B. Simon, Thomas Blythe, George W. Osborn, James Phelan, David Hunter, P. Marsicano, L. Carivaux, and Josephine Robinnett, filed objections in the County Court to the report and proposed thereunder to contest the same before the Court, and were about to contest the same for the matters hereinbefore set forth, and other matters; and thereupon, the commissioners induced them to withdraw their objections, and, to prevent the matters from becoming publicly known, secretly and collusively and fraudulently entered into an arrangement with the objectors respectively, by which the objectors agreed to withdraw their objections, and the Board of Commissioners, by their attorney, agreed, in consideration thereof, to change or procure to be changed, their report as to the property of said objectors specified particularly, and that thereupon, and in pursuance of the arrangement, and upon the consent of the objectors respectively, and of the commissioners, the County Court entered an order as to each objector, directing the Board of Commissioners to modify the report, as above stated. The report was modified accordingly, and, as so modified, was confirmed by the Court by an order entered in its minutes, on the 20th of December, 1876.

That the changes were ordered by the Court upon the consent of the objectors and the commissioners alone, without any investigation of the subject-matter of the objections, and without any actual consideration of the merits, and without any proofs of any kind.

That the changes and alterations were made by the Board of Commissioners, for the sole purpose of inducing these persons to withdraw their objections, and to pre-

vent an examination on the merits, and to prevent publicity as to the frauds contained in the report, and without the consent, knowledge, or approval of the other persons affected by the assessment; and the orders were, in fact, obtained by fraud and collusion, and imposition upon the Court.

That, in making the changes and alterations, deductions and additions, a different mode of estimating the extent of benefits, and the value of property taken was applied to the property of those persons from that which was in the report applied to the property of the other persons affected by the asssessment, to their detriment.

§ 13. This paragraph alleges in detail, and at length, the proceedings in respect to the objection of one Blythe, a property owner on said street, and the action had thereupon substantially to the effect mentioned in the preceding paragraph.

§ 14. That the commissioners did not, in fact, perform their duties, but delegated the peformance thereof to certain experts.

That the commissioners adopted the estimates of the experts as to all matters, and embodied the same in their report, without ever, in fact, having made any estimate of their own.

§ 15. That A. J. Bryant, mayor of said city, and one of the Board of Commissioners, was interested as property owner in the improvement; that the experts, Ivers and Reynolds, were likewise interested, and that Bryant was not a disinterested commissioner, but was, in fact, acting as a judge in his own cause.

§ 16. That the Board of Dupont Street Commissioners never, in fact, acquired jurisdiction to widen any portion of Dupont street, yet, that it did organize, did estimate

and report as aforesaid, and upon the confirmation of their report proceeded to issue and did issue bonds based upon the assessment to the amount of just one million ($1,000,000) dollars, more than seventy thousand ($70,000) dollars over and above what, according to their own estimate, they were entitled to issue, and that the Board of Supervisors, professing to act under section 13, levied a tax based upon the estimate of the benefits sufficient to pay seven (7) per cent. interest upon the one million dollars of bonds, and one-twentith (1-20) of the principal of the bonds.

§ 17. That the Board of Commissioners reported that the amount of benefits accruing from said improvement was $796,837, and that the total cost and expense of the said improvement of widening said street was $914,941.

§ 18. "*That the said order and decree of the said County Court approving and confirming said report recites specifically that every step required by said act was taken by said Board of Supervisors, by said Board of Dupont Street Commissioners and by said Court; and said proceedings all appear to be regular on their face, and make a prima-facie lien on all the said estate and lands described in sub-division three (3) hereof, and upon each of the parcels of land described in said Exhibit 'A' and the amount set opposite each description.*

"*That said proceedings constitute an apparent lien upon all the said real estate of the plaintiffs, and work a cloud upon the respective titles of the plaintiffs to their said respective lots, and do an irreparable injury thereto.*"

§ 20. "That none of the facts alleged in the seventh, eighth, ninth, tenth, twelfth, thirteenth, fourteenth and fifteenth paragraphs hereof were discovered by or known to these plaintiffs or either of them prior to the fifth day of April, A. D. 1878, and they have never acquiesced in said assessment or in any manner consented thereto, but have in every possible manner contested the same."

§ 21. That the defendant, as tax collector, was about to sell the property of the plaintiffs.

§ 22. *That the sales of the tax collector, if made, will constitute clouds upon the title of the plaintiffs.*

That the assessment is so onerous that it amounts to practical confiscation.

§ 23. That the plaintiffs be granted leave to bring this suit for themselves and all others affected by the said tax, on account of the multiplicity of suits which would be required to bring an action in the name of each of them, and the numerousness of parties and the common interest in the common lien, and because the grievances are common to them all.

The complaint concludes with the prayer that the defendant, as tax collector, be enjoined from making the threatened sale.

Note.—From the analysis of the complaint, two important points are to be noted:

First. The plaintiffs admit that the statute in question is constitutional. Their averment is that the proceedings under the statute are valid upon their face and work a cloud upon the title to the lands of plaintiffs. Of course, if the act under which the tax was levied was unconstitutional, the tax could not be valid upon its face nor cast a cloud upon plaintiffs' property—the tax would be void upon its face and a nullity. The plaintiffs invoke the aid of a court of equity upon the express averment that the proceedings constitute a cloud. Doing this, they necessarily admit the constitutionality of the act. Had they averred that the act was unconstitutional this would have been an admission that the proceedings did not constitute a cloud, and, therefore, that

the ground upon which the aid of equity was invoked failed.

Ewing v. *City of St. Louis*, 5 Wall., 413.
Houghton v. *Austin*, 47 Cal., 646.
Dean v. *Davis*, 51 Cal., 406.
Cool. Tax., 542, Note 2; 2 Black. Tax Tit. (5 ed'n), §§ 1066–67.

Secondly. The plaintiffs, to excuse to the Chancellor their apparent laches and delay, aver [§ XX] that not until long after the proceedings under the statute had terminated had they notice of certain secret vices in the proceedings, which they claim to entitle them to relief. These alleged undiscovered vices are set forth in paragraphs VII, VIII, IX, X, XII, XIII, XIV, and XV of the complaint, and are, 1 [§ VII of complaint], that the commissioners in valuing the property treated the frontage taken by the widening from a lot as a front lot instead of a rear lot; 2 [§§ VIII and IX, *Id.*], that in estimating benefits the commissioners intentionally adopted a false rule; 3 [§ X, *Id.*], that the commissioners added to the costs and expenses a large, unauthorized amount; 4 [§ XII, *Id.*], that certain objections to the report were withdrawn upon certain concessions made by the commissioners; 5 [§ XIII, *Id.*], that improper action was taken by the commissioners with respect to the objections of Blythe; 6 [§ XIV, *Id.*], that the work was not done by the commissioners but by experts; 7 [§ XV, *Id.*], that one of the commissioners and the experts had personal interests to subserve.

These are all the facts of which the plaintiffs claim to have been ignorant.

Of all other matters which were done under the statute they do not deny knowledge. They do not deny that they knew that the Board of Commissioners had organized and proceeded to act; that they had made

their report; that that report had been presented to the court for confirmation; that the court had confirmed it; that one million of bonds had been issued and sold to pay for the improvement; that the proceeds of these bonds had gone to pay the damages and expenses; that all damages had been paid, and thereupon that the street had been widened in conformity with the statute.

These things the plaintiffs do not—for they could not—deny. They were matters of public notoriety, taking place at their own doors, under their very eyes, extending over a period of several months, involving the widening of an important thoroughfare on which their property fronted. It would have been utter nonsense to attempt to deny knowledge of them. Indeed, one of the plaintiffs who verifies the complaint (L. Carriveau) was himself one of the objectors to the report before the county court, and swears in the complaint [§ XII] that he objected to the confirmation of the report "for the matters hereinbefore set forth, and other matters." In the absence of averment to the contrary, it must be presumed that property owners on a street know of a public improvement that is being made therein, and of the authority or assumed authority under which it is made.

City of New Haven v. *Fair Haven*, 38 Conn., 422, 432.
Story v. *Freeman*, 25 N. Y., 230.
The People v. *The Common Council*, 65 Barb., 9, 21.
Patterson v. *Baumer*, 43 Iowa, 477, 482.
Kellogg v. *Ely*, 15 Ohio St., 64.
Webber v. *San Francisco*, 1 Cal., 455.
Motz v. *Detroit*, 18 Mich., 495.
Evansville v. *Pfesterer*, 34 Ind., 36.
Lafayette v. *Foster*, *ib.*, 140.
Sleeper v. *Bullen*, 6 Kan., 300.

The fact, therefore, that while the widening of this

street was going on the plaintiffs knew of it, and took no steps to interfere with or prevent it; but, on the contrary, remained silent until the work was completed and they had received the full benefit of it stands established in this case, and they must be held as having waived all right to any remedy against the proceedings.

Cool. Tax. supra, 573–4, note 5.

The answer filed in the cause consists in the main, of a denial of the allegations of the complaint.

The findings filed in favor of the plaintiffs, respond to the issues.

The Court further found (finding XXXVI, Rec. 138) "that,after the said confirmation by the said County Court, and during the first seven months of the year 1877, the said Dupont street, between Market and Bush streets, was actually widened on the ground, from an original width of forty-four (44) feet, to a width of seventy-four (74) feet, measured westerly from the original and present east line of said Dupont street, by the removal of the buildings thereon, and the turning of the same into a roadway and sidewalk; and, during the first seven months of the year 1877, the buildings and improvements upon the west side of said Dupont street, taken from said Market to Bush streets, were made to conform to the new line of the said street, as widened thirty (30) feet, and so still remain; and said (30) feet has, since the month of July, A. D. 1877, been devoted to the uses and purposes of a public street; and has been used, and is still used, as such by the public at large."

As already stated, an appeal from the decision of the Superior Court was taken to the Supreme Court. There, it was argued by the respondents (the plaintiffs) that the statute was unconstitutional in itself; and, if not, then that the proceedings had under the statute were so taken as to deprive the plaintiffs of certain constitutional rights,

chief among which was the right to *due process of law*, and this as we have seen, is all that is here, if in truth that is.

I.

To give this Court jurisdiction on a writ of error from a State Court, it is not sufficient that a federal question may have been decided; it must appear that such question was necessarily involved in the decision. It must appear that the decision of such a question was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

Moore v. *Mississippi*, 21 Wall., 636.
Lawler v. *Walker*, 14 How., 149.
R. R. Co. v. *Rock*, 4 Wall., 180.
Citizen v. *Board*, 98 U. S., 140.
Murray v. *Charleston*, 96 U. S., 432.
Brown v. *Atwell*, 92 U. S., 327.
Armstrong v. *The Treasurer* 16 Pet., 281.

II.

The decision of the federal questions argued in this case was not necessary to the judgment; that judgment could correctly be given without deciding the federal questions.

We understand the rule to be this: If the record presents two grounds of attack or defense—one federal, the other non-federal, either of which is legally sufficient to support the judgment of the State Court, this Court will not entertain jurisdiction of the cause, though the State Court in its decision has dealt with the federal ground alone and has passed the other by in silence.

Such is the doctrine of *Moore* v. *Mississippi*, 21 Wall., 636.

Moore was prosecuted in the State Court, under an indictment charging him with selling lottery tickets and keeping a gaming table. He pleaded in bar matters which gave rise to a federal question, but was responsive to the charge of selling lottery tickets alone, leaving the charge of keeping a gaming table wholly unanswered. To this plea a demurrer was interposed by the prosecution, on the ground that it showed no valid bar to the prosecution. The demurrer was sustained, and upon a plea of not guilty, the defendant was subsequently convicted. Upon appeal, the Supreme Court of Mississippi affirmed the judgment; but, in its opinion, placed its decision wholly upon the federal grounds raised by the plea.

Now, the ruling of the Circuit Court, in overruling the plea, was clearly justifiable upon grounds wholly apart from federal questions, viz., upon the ground that the plea, being to the whole indictment, was bad because it did not meet the whole case. This ground had never been mentioned or alluded to by the Supreme Court of Mississippi, which had based its decision wholly upon federal grounds.

This Court declined jurisdiction, saying (p. 639):

"We are not required to re-examine the judgment of a State court simply because a federal question may have been decided. To give us jurisdiction, it must appear that such a question 'was necessarily involved in the decision.' * * * It is sufficient for all the purposes of this case to hold as we do, that, if the record shows upon its face that a federal question was not necessarily involved and does not show that one was raised, we will not go outside of it, to the opinion or elsewhere, to ascertain whether one was in fact decided.

"In this case the record shows clearly upon its face that the decision of such a question was not required. The indictment was for selling lottery tickets and keeping a gaming table. The plea, although to the whole indictment, met only part of it. The charge of keeping a gaming table was left entirely unanswered.

"A plea to be good as a bar to the whole indictment, must meet the whole case. If it does not, it will be held bad upon demurrer.

"The demurrer to this plea was, therefore, properly sustained upon this ground. Such being the case, it is a matter of no consequence to us that the Court may have gone further and decided a federal question. The decision of such a question was not necessarily involved in the determination of the cause."

This doctrine was subsequently affirmed in—

Otis v. *B. Oregon*, 116 U. S., 548.
Adams v. *Burlington*, 112 U. S., 123.
Citizens v. *Board*, 98 U. S., 140.

Beatty v. *Benton*, 135 U. S., 244, came up from Georgia, upon the construction of a trust deed under the laws of that State, and in which it was claimed a federal question arose under an act of Congress and the 14th amendment, and this Court held: "The case was decided against the plaintiff in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment. In such a case, even though the State court also decides a federal question against the plaintiff in error, this Court dismisses the writ of error without considering the federal question." (See cases cited.)

If, in the present case, therefore, it should be assumed that the Supreme Court of California in its opinion places its decision wholly upon federal grounds, yet, if the record shows upon its face that there is another and a non-federal ground upon which the judgment can legally and properly be sustained, this Court has no jurisdiction.

Does the record, then, show that a judgment dismissing the plaintiffs' bill is legally justifiable upon grounds wholly non-federal?

It must be borne in mind that the plaintiffs came into a court of equity to demand equitable relief. If

the record shows that, granting all they claim upon federal grounds, they are still, according to well-settled principles, disentitled to any equitable relief, the judgment dismissing their bill is justifiable upon wholly non-federal grounds.

The record shows that plaintiffs upon their own statement were not entitled to equitable relief.

The reason of this cannot be more clearly set forth than in the concurring opinion of Mr. Justice McKinstry (Rec., p. 357, *et seq.*)

Note.—In addition to the authorities cited by the learned justice, to the proposition that a court of equity will not interfere by injunction to prevent the collection of an assessment for improvements, which the complaining party has knowingly permitted to reach completion without interference on his part, the following authorities may, if desired, be consulted:

Patterson v. *Baumer*, 43 Iowa, 477, 482.
Pittsburgh v. *Scott*, 1 Barr., 309, 357.
Kellogg v. *Ely*, 15 Ohio St., 64, 67.
Wiggin v. *Mayor, &c.*, 9 Paige, 16, 24.
State v. *The Mayor, &c.*, 40 N. J. L., 244.
The People v. *The Common Council*, 65 Barb., 9, 21.
State v. *Wertzel*, 62 Wis., 184, 186.
Quinlan v. *Meyers*, 29 Ohio St., 500, 511.
State v. *The Mayor*, 36 N. J. L., 158.
City of New Haven v. *Fair Haven*, 38 Conn., 422, 432.
Stevens v. *Franklin Co.*, 48 Mo., 167.
Skinner v. *Hartford Bridge*, 29 Conn., 523, 535.
New Haven v. *Town*, 42 Conn., 465.
Society for Savings v. *New London*, 29 Conn., 174,191.
Strasser v. *Fort Wayne*, 100 Ind., 443.
Ricketts v. *Spraker*, 77 Ind., 371, 381.
Baltimore v. *Strauss*, 37 Md., 237, 243.
Whittlesey v. *The Hartford R. R. Co.*, 23 Conn., 421, 432, *et seq.*

Hitchcock v. *Danbury*, 25 Conn., 515.
Erie R'y Co. v. *Delaware, &c., Co.*, 21 N. J. Eq., 283, 289.
Mahaska v. *Des Moines*, 28 Iowa, 437, 454.
Goodin v. *Cincinnati*, 18 Ohio St., 169, 180.
Motz v. *City of Detroit*, 18 Mich., 465, 528.
City of Burlington v. *Gilbert*, 31 Iowa, 356, 365.
Commonwealth v. *City of Pittsburg*, 43 Pa. St., 391.
Bidwell v. *City of Pittsburgh*, 85 Pa. St., 412.
Tash v. *Adams*, 10 Cush., 252.
Matter of Application of Cooper, 93 N. Y., 507.
Daniels v. *Tearney*, 102 U. S., 415, 420.
Matter of Application of Woolsey, 95 N. Y., 144.
City of Lafayette v. *Fowler*, 34 Ind., 140, 146.
Hellenkamp v. *City of Lafayette*, 30 Ind., 182, 194.

And this principle, so well adjudicated, receives full recognition by the commentators—

Cool. Tax., *Sup.*
2 Black. Tax Tit. (*Sup.*), § 1061.

It is submitted, therefore, that the plaintiffs' case, as set forth by themselves in their bill of complaint, does not present any federal questions. And as shown in Judge McKinstry's opinion, this remedy is not recognized in California. Under the circumstances here existing, no federal question can be considered, or, if considered, it avails not.

III.

An examination of the whole record shows that no federal question arose in the case.

We have already shown that the plaintiffs cannot urge here, as a federal question giving this Court jurisdiction, the unconstitutionality of the act. They invoked the jurisdiction of the State Court, in the first instance,

by an admission that the act was constitutional, an averment in their bill that the tax was valid upon its face, and cast a cloud upon their property. They cannot now change front. It would be strange, indeed, if, having successfully invoked the jurisdiction of the lower Court upon the ground that the statute is constitutional, they could now invoke the jurisdiction of this Court upon the ground that it is not.

For all the purposes of this case, the plaintiffs have conceded the constitutionality of the act. This leaves as the only possible federal question in the case, the claim that, in executing the act, such violations of its provisions have taken place as have resulted in depriving the plaintiffs of some constitutional right.

We propose to examine wherein the plaintiffs complain that the provisions of the statute have been violated, and to show by the record that, in no case, does the violation, if any, give rise to any federal question.

1. The first violation of the act is charged [§ IV of complaint], to be that the Board of Supervisors did not pass any ordinance or resolution under section 21 of the act.

The answer to this claim is:

First. Assuming that the resolution or ordinance was not passed this did not deprive the plaintiffs of any constitutional right. Nothing in the Constitution, State or Federal, makes the passage of such an ordinance a condition precedent to the power of the Legislature to order the opening or widening of a street in the city of San Francisco. On the contrary, it is well settled in California that the Legislature may order such an improvement without consulting any, except its own sovereign will.

People v. *San Francisco*, 36 Cal., 595.
De Witt v. *Duncan*, 46 Cal., 342.
Polack v. *S. F. Orphan Asylum*, 48 Cal., 490.

Secondly. The Court below found [Finding I] that a

resolution was passed, but was not published with the yeas and noes, nor was it signed by the President of the Board. The contention of plaintiffs is that such publication and signing were necessary, and, without them, the ordinance was void. But this contention gives rise to no Federal question. Whether the resolution as passed was conformable to the State Statute is a question for the State Court to decide. And, in this case, the Supreme Court of the State have decided that it was, saying:

"March 27, 1876, the Board passed a resolution which fully satisfies the act." (Rec., 353.)

2. The second violation of the act is charged [§ V of complaint, to be that the Commissioners did not publish the notice required by § 6 of the act.

To this there are two answers:

First. If the notice was not published, this did not deprive the plaintiffs of any constitutional right. The notice simply apprised the property owners that the Board was organized, and invited them to present maps of their property and a statement of their claim of title. The parties had no constitutional right to such a notice. The act might have omitted it altogether and have been perfectly constitutional.

It is true that the publication of the notice set in motion the right of the property owners to arrest the improvement under § 12 of the act. But the right to arrest the improvement, under any circumstances, was itself purely of statutory and not of constitutional creation. A deprivation of it would do violence to the Statute not the Constitution. [See authorities cited to the last point.]

Thirdly. The Court below found [Finding IV] that the notice was published in two daily newspapers for the requisite length of time, but was, on some days, published in the "supplement" to the paper, and that the supplement of one of the papers was not circulated coextensively with said newspaper.

The only question then that arises here is: Was the publication in the supplement a compliance with the statute? This is not a federal question. The Supreme Court of California to which the decision of the question properly belonged said in this case:

"It is objected that the notices were not duly published, because sometimes printed in the supplements. The supplements, however, in this particular instance, were part and parcel of the newspaper itself. They constituted the third sheet when there was too much matter for the usual two-sheet issue. Why they were designated as supplements I do not know, nor does it matter; the mere fact that the word 'Supplement' was printed at the head could not change their character." (Rec., 354.)

3. The next violation of the act charged [§ VII of complaint] is that the Commissioners "knowingly, wilfully and intentionally ascertained and determined the value of the lots taken to be more than three times as much as they in fact were; by reason whereof the cost of the said widening was made three times as great as it ought to have been."

If the Commissioners were guilty of this wrong, the remedy of the aggrieved party was to appeal, under § 8 of the act, to the county court for redress. If he did not appeal, he deliberately neglected the remedy furnished him by law. If he did appeal and the Court denied him redress, he simply fell into the class of those who suffer from judicial errors of courts of justice. The county court approved and confirmed the report of the Commissioners; and that Court is not charged with any wrong-doing.

The error of Assessors in fixing the value of property for taxation or assessment, surely does not give rise to any federal question.

4. It is next claimed [§§ VIII, IX of complaint] that, in determining benefits accruing, the Commissioners

"wilfully, knowingly and intentionally adopted a false rule for the ascertainment thereof and one which was and is neither equal nor uniform."

And

5. It is further urged [§ X of complaint] that the "Commissioners, after they had estimated in full all the cost and expenses which could probably or at all arise in the said widening of Dupont Street, arbitrarily and illegally added thereto the further sum of seventy thousand nine hundred and thirty-five dollars, and included the same in their estimate of expense"; and said sum, through the negligence of the Commissioners, has been "misappropriated and converted and utterly lost."

To these we make the same answer as to the preceding. (3d.)

6. It is next urged [§ XI of complaint] that the notice provided by § 7 of the act was never published as required by the statute.

The Court found [Finding XXIV] that the notice was published for the requisite length of time in two daily newspapers in San Francisco—being on some days published in the body of the paper, and on others in the supplement. The contention of plaintiffs was, that the publication in the supplement was insufficient.

This objection has been answered under point 2, *supra*, pp. 19–20.

7. It is next claimed [§§ XII and XIII of complaint] that, after the Commissioners had made their report, various property owners filed in the county court objections to it, and proposed to contest the same; that, thereupon an adjustment was arrived at between said parties and the commissioners, by which, upon certain concessions being made by the commissioners, and certain

modifications of their report, the parties agreed to and did withdraw their objections; that, by said changes, the burden upon other property owners was increased; that none of the other parties to the proceeding had any knowledge or notice of these changes; that the report, as thus modified, was confirmed by the county court, the confirmation being made upon the consent of the objectors and the Board without any investigation of the subject-matter, and without any actual consideration of merits and without any proofs of any kind.

It is submitted that none of these matters give rise to any federal question.

All parties in interest were notified of the proceedings in the county court. They had due process of law by the publication of the notice provided for by § 7 of the act, and that charged them with notice of all the proceedings. They could, at any and all times, object to what was taking place in the county court. If they did not object, and permitted an erroneous or unjust report of the commissioners to be confirmed by the Court, upon what pretext can they now invoke the jurisdiction of the Court on the ground of a wrong which they had opportunity but neglected to remedy in the county court? The statute fully guaranteed them the constitutional right to be heard, and they have no one to blame but themselves if they did not avail themselves of it.

8. It is claimed next [§ XIV of complaint] that the statute was violated because the commissioners, instead of making the estimate of damages and benefits in person, as they should have done, adopted the estimates of experts, "and embodied them in their said report without ever, in fact, having made any estimate of their own."

It will hardly be claimed that this presents a federal question.

9. It is next urged [§ XV of complaint] that one of

the commissioners had personal interests to subserve in the improvement, and "was not a disinterested commissioner in the matter of said improvement, but was, in fact, acting in all said matters as a judge in his own cause."

The judgment of the interested commissioner was subject to review by the county court. It is not even alleged that, under the influence of self-interest, the commissioner did any wrong. The mere fact that he was interested must be claimed by them to be a violation of plaintiffs' rights under the Constitution of the United States.

It is submitted that this cannot be maintained.

10. It is claimed finally § [XVII of the complaint] that the benefits to accrue from the proposed improvement were fixed in the report of the commissioners, as confirmed by the county court, at $769,837.00, and the cost of the improvement at $914,941.00. It is said that the cost thereby appears to be more than the benefits. But this arises from an obviously erroneous construction of the statute. The power to determine what the amount of benefits was, was not delegated to the Board. The operation of the act did not depend upon their finding that the total benefits conferred in fact exceeded the expense. They were simply authorized *to apportion* the benefits among the respective pieces of property. All they had to do was to observe just *relative proportion.* They might take as their standard 1 or 10 or 100. As long as due proportion in the apportionment was observed their duties were discharged. This is very clearly set forth by the Supreme Court in its opinion here, where it says:

"They (the counsel for respondents) really claim that the act directs the commissioners to ascertain the benefits; that they did ascertain them, and determined that the

benefits would be less than the estimated cost of the improvement. In this, however, it is clear the counsel are in error. The act only requires the commissioners to estimate the benefit which will accrue to each lot relatively to the benefits which will accrue to other lots. The act certainly was not constructed upon the idea that the proceedings could be arrested by any possible finding in regard to benefits. Unless its final operation was made to depend upon such a finding, it is difficult to see why there should be one; nor, in my judgment, did the Commissioners pretend to ascertain the amount of such benefits. The report, as first filed, showed benefits and costs exactly equal, being each estimated at $898,-105.00. It would have been marvelous if, upon a real estimate of the amounts, they should have come out exactly equal, considering the great number of properties. If, however, they had first ascertained the amount of the cost of the improvement, it would have been easy to have distributed them proportionately upon the properties benefited; and this is evidently exactly what they did do." (Rec., 350.)

The language of the Supreme Court of California in answering the claim of the several violations of the statute which are hereinabove set forth in Points 3, 4, 5, 7, 8, 9, and 10, is apt and conclusive. The Court said:

"If there was a valid law authorizing the improvement, and the Board was authorized to act, and the county court obtained jurisdiction, the plaintiffs cannot complain here of mere irregularities or bad conduct on the part of the commissioners, for which that Court could have afforded relief. The alleged frauds were all such as by the exercise of a proper diligence ought to have been known by the interested parties in time to present to the county court.

"This action is by the property owners on the east side of the street—the property taken was immediately opposite. It is averred that the commissioners wilfully and intentionally determined the value of lots taken, to be more than three times as much as they in fact were, and omitted from their estimate of benefits to the same

lots, about two-thirds of the actual benefit. This overestimate of damages, so far as I can judge from the statement of the case in the record, seems to be fully sustained. But the report showed fully what the estimates were, and the injustice was so obvious, that a mere inspection by those familiar with the property, as the plaintiffs were, could not fail to disclose the fact.

"As to the interest of Bryant, one of the commissioners, I find no evidence of it, except the admission in the cross-complaint, that he had for seven or eight years owned the undivided half of a certain lot on the northeast corner of Dupont and Morton streets, which fact appeared on the maps and reports made by the Commissioners.

"But, admitting the validity of the statute, and that the preliminary steps were taken which authorized the work to be done, the plaintiffs cannot now maintain this action. The Statute, as I have already stated, manifested very plainly that the improvement was to be made for their special benefit, and that they were to bear the entire cost. They were afforded an opportunity, even after the Board was organized, to arrest proceedings if a majority in value of frontage should be of opinion that it would not be to their advantage, and were distinctly notified that if they would permit it to be completed their acquiescence would be deemed an absolute acceptance by them of the lien created by the act. Under such circumstances they could not remain silent and permit the money obtained of the bondholders to be expended in the improvement of their property, and then escape liability, on the plea that the officers charged with the work, who were in a sense their agents, were guilty of misconduct and fraud, which they, by proper diligence, could have prevented." (Rec., 354–5.)

Then, after all is said and done, we have a case arising purely under State legislation as to matters of local jurisdiction solely by and through machinery designated by the State legislature, and a special local tribunal named to enforce this legislation. The finding and judgment of this special court are final and conclusive; "such judg-

ment cannot be overruled or controverted in any original suit at law or in equity—its merits can nowhere be collaterally investigated—no error, however palpable, will vitiate it." (Freeman, Judg., 3d ed'n, 524, note 2.)

While courts of such jurisdiction are rigidly and strictly restrained within that jurisdiction, yet in the mode of proceeding a liberal construction is indulged.

Russell v. *Wheeler*, Hemp. C. C., 3.
Barrett v. *Chitwood*, 2 Bibb., 431.

All these matters have now been passed on by the highest Court of the State, and it has determined them under the State's own law, irrespective even of any alleged federal question. While the opinion of four of the judges (Temple, Searls, Thornton and McFarland) passes on the question of due process of law, yet the case is settled by other parts of the opinion on questions not federal in any manner (Rec., 332–57) and the opinion shows a decision of a federal question was by no means necessary in determining the case, and the matter thus comes directly within the doctrine of Beatty *v.* Benton, 135 U. S. *Sup.* But besides this, the concurring opinion of Judge McKinstry (Rec., 357, *et seq.*) places it beyond dispute, that a complete determination of the case required, in no respect, the passing upon any federal question.

If all that is here is not a question for California courts to determine, then the court would be sorely puzzled to find a case that is, and must take a look back and see, if besides the cases already referred to, the following have not been erroneously decided:

Mitchell v. *Clark* 110 U. S., 638.
Sugg v. *Thorton*, 132 *ib.*, 524.
Union Bank v. *Kansas City*, 136 *ib.*, 228.
York v. *State of Texas*, 137 U. S., 15.

And it will severely try the Court, it is respectfully sub-

mitted, after having declined to examine into the judgment of the Supreme Court of Alabama, in *Dugger* v. *Bocock, 104 U. S., 596*, to find a substantial reason, for taking jurisdiction, to look into and pass upon the ruling of the Supreme court of California in this case.

Should the Court, however, be of the opinion that there is a federal question properly presented let us see what it is!

It is only, as before stated, whether the plaintiffs in error have been deprived of due process of law?

In assessment or tax proceedings, the utmost that the property holder can claim is, that he shall have an opportunity to be heard before the charge is fully established against him.

Cool., Tax., 265.
Sedgwick, Const., 474–7 (note A to p. 475).

These proceedings are, as stated by *Hare in 2 Am. Cons'l Law, pp. 869–71*, in the nature of an arbitration or appraisement, rather than a suit, and do not require all the strictness of a regular judicial investigation, and the constitutional requirements are satisfied in such cases, when a competent tribunal is provided, proceeding with notice, before which the parties may appear and have a hearing, &c., &c., and he cites—

Wurtz v. *Hoagland*, 114 U. S., 606.
Barbier v. *Connolly*, 113 *ib.*, 27.
Hagar v. *Reclamation Dist.*, 111 *ib.*, 701.
Ex-parte Wall., 107 *ib.*, 265.
Davidson v. *New Orleans*, 96 *ib.*, 97.

The language of Mr. Justice Miller in *Davidson* v. *New Orleans*, pp. 103–4, is as appropriate and applicable in this controversy as it was in that case, and merits great attention. And the *Davidson-New Orleans* case was cited with emphatic approval by this Court in *Kentucky R. R.*

Tax Cases, 115 U. S., 321–34, which it would seem leaves nothing of this controversy at all.

As already shown, the Statute—§ 8—confers upon the county court jurisdiction to alter and modify the report of the Board of Commissioners, and to approve the same. In that respect the statute is fully upheld by the Supreme Court of the State in this action. (Rec., 344–6.) And it is there further held, that the county court was vested with jurisdiction of every matter and question in the proceeding; and that any person interested therein, might have presented to that Court any objection to the report or proceedings of the Board; and as the learned Justice rendering the opinion, tersely said it seemed to have required "great industry in going wrong" to conclude that the narrower construction as to the extent of the Court's jurisdiction, contended for by plaintiffs, could be the correct one. This construction of the statute by the State Court is conclusive here.

The jurisdiction of the county court being sufficient to comprehend all possible objections that might have been made, the only question involved in the requirement of due process of law, is whether the statute provided for, and property holders received sufficient notice that the report of the Board was at their office for the "free inspection of all persons interested," as provided by § 7 of the statute; that is to say, such notice as will be regarded as sufficient in proceedings of this character.

Upon this question there would seem to be no room for doubt. The power of the Legislature of a State to provide for the giving of notice by publication to all persons interested in proceedings of this character is beyond all question.

If desired, the following array of authorities may be consulted in this connection:

San Francisco v. *Certain Real Estate,* 42 Cal., 512.
People v. *The Mayor of Brooklyn,* 4 N. Y., 441.

The Methodist v. *The Mayor*, 6 Gill (Md.), 391.
Matter of DePyster, 80 N. Y., 567.
Stuart v. *Palmer*, 74 N. Y., 183.
Johnson v. *Joliet*, 23 Ill., 202, 205.
The State v. *The Mayor*, 24 N. J. L., 662.
Owners of Ground v. *The Mayor*, 15 Wend., 374.
Wilson v. *Hathaway*, 42 Iowa,137, 176.
Cupp v. *Commissioners*, 19 Ohio St., 173.
Polly v. *Saratoga*, 9 Barb., 449, 460.
Freetown v. *County Commissioners*, 9 Pich., 46.
Squares v. *Campbell*, 41 How., Pr., 193, 200.
Matter of Empire City Bank, 18 N. Y., 199.
Tracy v. *Corse*, 58 N. Y., 143, 151.
Chamberlain v. *Cleveland*, 34 Ohio St., 551, 569.
Taylor v. *County Commissioners*, 18 Pick., 309.
Risley v. *St. Louis*, 34 Mo., 404, 417.
People v. *Hagar*, 51 Cal., 171.
Gilmore v. *Hentig*, 33 Kan.,
Rockwell v. *Nearing*, 35 N. Y., 317.
Wilson v. *Hathaway*, 42 Iowa, 173.
Matter of Lower Chatham, 35 N. J. L., 497.
State v. *The Mayor*, 31 N. J. L., 360.
State v. *Village*, 37 N. J. L., 65.
Scott v. *Brackett*, 89 Ind., 413.
People v. *Smith*, 21 N. Y., 595.
Potter v. *Ames*, 43 Cal., 78, 79.
Matter of Application of Mayor, 99 N. Y., 569, 581.
Hare, Sup., note 4 to p. 869.

The notice required by § 7 of the statute—that the report of the Board was at its office, etc., for the free inspection of all persons interested—was published for the requisite time. (Findings Nos. 23 and 24, Rec., 129–130.)

The only remaining question in regard to the publication is whether it was made in conformity with the statute—whether the publication for some portion of the twenty

days, in what is called a *supplement* to a newspaper, constituted a publication in the newspaper within the meaning of the statute. But this is a question of statutory construction, and not in any sense a federal question; and its decision by the Supreme Court of the State is conclusive authority here. That Court held that the notice was published in conformity with the requirements of the statute (Rec., 354) * * * and if this were an open question here the decision of the Supreme Court of California is supported by authority everywhere.

Cool., Tax., 337.
1 Black. Tax Tit., § 400, note 7; ib., 403–5.
Burr. Tax. 291.

Further argument can scarcely be needed in this case, but if it should be, the opinion of the four judges already alluded to (Rec. 335, *et seq.*), is, we submit, unanswerable, as it is upon all the other questions raised as to the proceedings, if they were before this Court for adjudication; and we insist the writ of error should be dismissed for want of jurisdiction, or if not, the case should he affirmed.

JOHN MULLAN,
A. H. GARLAND,
H. J. MAY,
For Defendant.

Supreme Court of the United S[illegible]

No. _____

W. M. LENT, ET ALS.,

Plaintiffs in Error,

vs.

CHARLES TILLSON,

TAX COLLECTOR OF THE CITY AND COUNTY OF SAN FRANCISCO,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Notice of Motion to Dismiss Writ of Error and to Affirm Judgment.

HALL McALLISTER,

Attorney for Defendant in Error.

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HALL McALLISTER,
Attorney for Defendant in Error.

IN THE

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OF

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W. M. LENT, ET ALS.,

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vs.

CHARLES TILLSON,

Defendant in Error.

Notice of Motion to Dismiss Writ of Error, ~~and~~ or to Affirm the Judgment.

Take notice, that Charles Tillson, the defendant in error in the cause above-entitled, will move the Supreme Court of the United States, at the Court-room of said Court, in the City of Washington, D. C., at the opening of said Court, or as soon thereafter as counsel can be heard, on Monday, the 16th day of April, A. D. 1888, to dismiss the writ of error heretofore sued out and allowed in this cause.

Said motion will be made upon the record of said cause, now on file in the office of the Clerk of said Court, and upon the following grounds, to-wit:

1. That it appears from said record, that said Court has no jurisdiction of or in said cause, because in the suit in which the final judgment or decree of the Supreme Court of California was rendered, from which said writ of error was sued out, there is not drawn in question the validity of a treaty or Statute of, or an authority exercised under the United States, nor is the decision of said Supreme Court against the validity of any such treaty, statute or authority.

2. That it appears from said record, that said Court has no jurisdiction of or in said cause, because, in the suit in which the final judgment or decree of the Supreme Court of California was rendered, from which said writ of error was sued out, there is not drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, nor is the decision of said Supreme Court in favor of the validity of any such statute or authority.

3. That it appears from said record, that said Court has no jurisdiction of or in said cause, because, in the suit in which the final judgment or decree of the Supreme Court of California was rendered, from which said writ of error was sued out, no title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, nor is the decision of said Supreme Court against the title, right or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority.

Further take notice, that said defendant in error, will also move said Supreme Court, at the time and place aforesaid, to affirm the judgment of the Supreme Court of California in the action from the judgment or decree in which the writ of error was sued out, on the ground that

although the record in said cause may show that this Court has jurisdiction of said cause, it is manifest that the question on which the jurisdiction depends, is so frivolous, as not to need further argument.

HALL McALLISTER,
Attorney for Defendant in Error.